Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RAY L. LEFLORE, individually and as a partner of PAVELIC & LEFLORE (now dissolved),

Petitioner,

vs.

THE MARVEL ENTERTAINMENT GROUP, a division of CADENCE INDUSTRIES CORPORATION, JAMES GALTON, AL BRODAX, MICHAEL S. KLEIN, THE SHUKAT COMPANY, LTD., SCOTT SHUKAT and PETER S. SHUKAT, ESQ.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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274

QUESTIONS PRESENTED

I. Where, as here, the trial court specifically found there was no bad faith pursuit of any factual allegation asserted by plaintiff, may sanctions of $200,000 be sustained against one of plaintiff's attorneys, pursuant to FRCP 11, after a lengthy and complex trial, in a case which survived motions for summary judgment and directed verdict, and was ultimately submitted to the jury?

II. Should this Court resolve a direct conflict between the Second Circuit and other courts of appeals as to whether a denial of motions for summary judgment precludes Rule 11 sanctions on the same facts that were previously held to present genuine issues for trial?

III. Did the court of appeals, on remand, exceed (or disregard) this Court's mandate in *Pavelic & LeFlore* v. *Marvel Entertainment Group, et al.*, and otherwise decide this case in conflict with controlling decisions of this Court, by: (i) failing to follow the plain language of FRCP 11 in respect of joint and several liability; (ii) failing to find any discrete event for which sanctions could be imposed; (iii) sua sponte increasing sanctions for parties who did not appeal or cross-appeal; and (iv) continuing to adhere to a flawed analytical approach, unrelated to

any documents signed, that was specifically repudiated by this Court before the hearing on remand?

TABLES OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 11

I. This Court Should Resolve a Clear Conflict Between Rule 11 and Other Pre-Judgment Federal Rules of Civil Procedure 11

II. This Court Should Resolve a Direct Conflict Among the Circuits on Post-Judgment Motions for Sanctions Under Rule 11 19

III. The Court of Appeals Exceeded (and Disregarded) Its Mandate Here 23

Page(s)

IV. The Court of Appeals Disregarded this Court's Other Controlling Decisions 27

CONCLUSION 30

TABLE OF AUTHORITIES
CASES

Page(s)

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S. Ct. 2505 (1986) 14

Business Guides Inc. v. Chromatic Communications Enterprises, Inc.,
498 U.S. 533, 111 S.Ct. 922 (1991) 7,9,23,24,25

Cooter & Gell v. Hartmax Corp.,
496 U.S. 384, 110 S.Ct. 2447 (1990) 7,25

Indianapolis Colts v. Mayor & City Council,
775 F.2d 177 (7th Cir.1985) 21

Jennings v. Joshua Independent School District, et al.,
948 F.2d 194 (Cir. 1991) 21

LeBeau v. Libbey-Owens-Ford Co.,
799 F.2d 1152 (7th Cir. 1986), reh. denied,
808 F.2d 1272 (1987), cert. denied,
sub nom *Local 19 v. Equal Employment Opportunity Commission*, 484 U.S. 815,
108 S.Ct. 67 (1987) 21

Matter of Yagman,
796 F.2d 1165 (9th Cir. 1986)
cert. denied, sub nom, *Real v. Yagman*,
484 U.S. 963, 108 S.Ct. 450 (1987) 14,19

Page(s)

Media Duplication Service v. HDG Software, Inc.,
928 F.2d 1228 (1st Cir. 1991) 22

Morley Construction Co., v. Maryland Casualty Co.,
300 U.S. 185, 57 S.Ct. 325 (1937) 27

National Bank of Arizona v. Cities Service Co.,
391 U.S. 253, 290 (1968) 14

Pavelic & LeFlore v. Marvel Entertainment Group, et al.,
493 U.S. 120, 110 S.Ct. 456 (1989) 1,18,23

Soderbeck v. Burnett County,
752 F.2d 285 (7th Cir.), cert. denied,
471 U.S. 1117, 105 S.Ct. 2360 (1985) 21

Souran v. Travelers Insurance Co.,
982 F.2d 1497 (11th Cir. 1993) 20

United States v. American Railway Express Co.,
265 U.S. 425, 44 S.Ct. 560 (1924) 28

STATUTES

FRCP 11 . . . . . *passim*
FRCP 16 1,11,15,18
FRCP 50 1,11,16,17
FRCP 56 1,11,12,14,15

Page(s)

OTHER AUTHORITY

Comments on Federal Rule of Civil Procedure 11 and Related Rules, The Record of the Association of the Bar of the City of New York, Volume 46, Number 3, page 267, et seq. (April 1991) 17-18

LIST OF PARTIES

The parties to the proceedings below were:

Ray L. LeFlore, individually, and as a partner of Pavelic & LeFlore (now dissolved)--Appellant;

The Estate of Northern J. Calloway, individually and on behalf of LMN Productions, Inc. -- Plaintiff-Appellee;

The Marvel Entertainment Group, a division of Cadence Industries Corporation, James Galton, Al Brodax, and Peter S. Shukat, Esq. -- Defendants-Appellees;

Scott Shukat and The Shukat Company, Ltd. -- Defendants-Appellees; and

Michael S. Klein -- Defendant-Appellee.

Opinions Below

This Court's decision in *Pavelic & LeFlore* v. *Marvel Entertainment Group, et al.* (Appendix D) is reported at 493 U.S. 120, 110 S.Ct. 456. The underlying opinion of the court of appeals, before remand (Appendix A), and those of the district court, before remand (Appendix B; C), are reported at 854 F.2d 1452, 111 F.R.D. 637 and 650 F.Supp. 684, respectively. The opinion of the court of appeals, on remand (Appendix E), and that of the district court, on remand (Appendix F), are reported at 9 F.3d 237 and 138 F.R.D. 646, respectively.

Jurisdiction

The judgment of the court of appeals was entered November 9, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was premised upon 28 U.S.C. § 1338, et seq.

Statutes Involved

The full text of Rule 11 of the Federal Rules of Civil Procedure, as it existed at all relevant times below, is reproduced at Appendix G. The Rule has since been amended, effective December 1, 1993; the full text of the Rule, as amended, is reproduced at Appendix H.

FRCP 16 is reproduced at Appendix I; FRCP 50 is reproduced at Appendix J; FRCP 56 is reproduced at Appendix K.

Statement of the Case

This action was commenced by plaintiff in December 1982, as the copyright owner of a script for a feature length animated film, tentatively entitled "The Skyrider". Plaintiff was then -- and continued until his death to be -- best known in the entertainment field as "David" of Sesame Street. LeFlore signed his complaint and continued thereafter as one of plaintiff's attorneys.

The amended complaint (signed by LeFlore, after dismissal of the original complaint on technical grounds, with leave to replead) asserted federal claims of copyright infringement, unfair competition and conspiracy to misappropriate, and pendent state claims for breach of fiduciary duty, invasion of privacy and waste of corporate assets.

Before any answer or discovery was had, four defendants were dismissed, with all related allegations as to them stricken from the amended complaint.[1] The remaining defendants then sought summary judgment, and plaintiff cross-moved for summary judgment (on liability only),

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[1]The four dismissed defendants were thereafter joined as third-party defendants, with three (3) remaining as such throughout the litigation. While they continued to participate as third-party defendants in various aspects of discovery, they only returned on the eve of trial as parties-defendants in pendant state claims, which plaintiff was then permitted to re-assert.

based upon the remaining defendants' admissions of access and use. Both motions were denied by opinion entered July 5, 1984, and discovery followed. At every juncture thereafter, motions were made: to compel further depositions of plaintiff (granted); to compel further answers to interrogatories from plaintiff (granted); for a special master to supervise discovery (granted); and to compel depositions of plaintiff's damage and questioned-document experts (granted). Finally, before trial began, defendants sought and obtained detailed amendments to plaintiff's final proposed pre-trial order, in which plaintiff particularized every disputed factual allegation to be tried.

Trial began April 7, 1986. Testimony was given by 19 witnesses and by extensive reading of depositions. Approximately 250 exhibits were admitted. At the close of plaintiff's case, defendants moved for directed verdict, which was denied. As a consequence of the trial court's determination, the trial proceeded another eight (8) days. When defendants rested at the close of their cases, defendants again made motions for directed verdict. Those too were denied.[2] The case was not dismissed; it was submitted to the jury. On May 15, 1986, the jury returned its verdict. While it confirmed the validity of plaintiff's

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[2]Technically, the district court reserved decision on most of the issues with respect to the motion for directed verdict at the close of defendants' case. It did not reserve decision on the motions at the close of plaintiff's case.

copyright ownership, the jury answered all other special interrogatories in favor of defendants.

After the trial, with the trial court's consent, defendants sought sanctions against plaintiff and plaintiff's attorneys. The trial court denied every basis urged for sanctions, except one: a single factual allegation of "document tampering" -- one of many alleged in support of plaintiff's claims for relief -- which it held was not sufficiently investigated or supported by fact[3]. It did not find any violation of Rule 11's requirements pertaining to legal sufficiency, and specifically found there was no bad faith pursuit of the document tampering allegation. The trial court nevertheless held:

> "The effort to offer [plaintiff] every opportunity to prove his case, as argued by his counsel, was in hindsight mistaken and not in the best interest of any of the parties...." (76a)

From this, the trial court proceeded to impose sanctions against plaintiff and plaintiff's law firm, in equal amounts, totalling twenty percent (20%) of all defendants' fees for the entire litigation.

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[3]We do not dwell on the court's putative distinctions between the "facsimile" allegation, for which sanctions were imposed, and the "white-out" claim, which it held was not frivolous. As shown hereinafter (pp. 15-16, infra), that distinction was never real, or relevant, to Rule 11, after the trial.

On a subsequent motion for reconsideration made by one of the partners of the firm (by then dissolved), the trial court reduced by half the firm's liability -- imposing that half on LeFlore, alone -- based solely upon its finding that the firm did not come into existence until approximately half-way into the litigation. The judgment entered thereon awarded defendants a total of $200,000, pursuant to Rule 11 ($100,000 to be paid by plaintiff, $50,000 by LeFlore and $50,000 by LeFlore and Pavelic & LeFlore, jointly and severally).

On appeal[4], the court of appeals affirmed every substantive element of the trial court's sanctions decision. The court acknowledged that numerous legal and factual issues existed throughout the action on which the jury was instructed to deliberate at the conclusion of trial, and noted as well the presence of other lawyers for plaintiff throughout the trial (including specifically Raymond A. Levites -- a partner of the firm and a former Assistant United States Attorney -- who signed plaintiff's final amended pre-trial order, and shared equally the witnesses at trial, both on direct and on cross, as well as jury summation). The court likewise affirmed the trial court's "chronological yardstick" for allocating sanctions between LeFlore and his firm

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[4]Plaintiff (Northern J. Calloway), LeFlore and Pavelic & LeFlore each appealed; the Marvel Entertainment Group, James Galton and Al Brodax cross-appealed; Michael S. Klein and Peter S. Shukat did not appeal or cross appeal; the appeal by Scott Shukat and his company, The Shukat Company, Ltd., was dismissed.

(indeed, specifically upheld the district court's finding that "it [was] impossible to allocate to individual pleadings, motions or other papers the reasonable expenses incurred...") (66a), and ordered the matter remanded for reconsideration of the proper mix of all sanctions affirmed ($200,000), including whether plaintiff's sanctions should be reduced and, if so reduced, whether the firm's should be increased, or the firm merely made jointly and severally liable for all of plaintiff's sanctions. In order to do so, the court of appeals specifically reversed the trial court's "objectively reasonable" test for plaintiff's conduct, holding:

> "That test ... is appropriate only in evaluating the conduct of attorneys under Rule 11, not the conduct of parties represented by attorneys." (51a).

The issues, on remand, the court of appeals held, fairly arose from plaintiff's reinstated appeal and the cross-appeals by Marvel, Galton and Brodax. It said nothing about those defendants who did not appeal or cross-appeal, or had their appeals dismissed.

On writ of certiorari[5], sought by Radovan S. Pavelic, a partner of Pavelic & LeFlore (dissolved), this Court

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[5]LeFlore did not seek certiorari, preferring instead to await the district court's hearing on remand and, after such hearing, the court of appeals' final determination. Accordingly, none of the issues raised by this Petition have previously been reviewed by the Court in this case.

vacated entirely the sanctions imposed (and to be determined) against the law firm, reversed "insofar as ... Rule 11 sanctions [were] imposed against Pavelic & LeFlore" (166a), and remanded the case for further proceedings consistent with its opinion.[6]

Before the hearing on remand, this Court also decided two other cases involving Rule 11: *Business Guides Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S.Ct. 922 (1991); and *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 110 S.Ct. 2447 (1990). Although the district court was clearly aware of those decisions, it nevertheless chose to adhere to its own analytical approach, shifted the law firm's sanctions to LeFlore (now $100,000), reinstated plaintiff's own sanctions of $100,000 and ordered that all of plaintiff's sanctions be borne jointly and severally by LeFlore. The sanctions against LeFlore thus totalled $200,000.

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[6]The court of appeals apparently had great difficulty with this Court's mandate, not only because it had previously found it "impossible" to allocate sanctions, but also had premised joint and several liability on common-law grounds implicitly rejected by this Court. Thus, after ordering "that [its] judgment...be and it is hereby reversed and the mandate recalled in accordance with the opinion of the Supreme Court", upon further reflection (and letter-briefs from all parties), the court of appeals merely remanded to the district court "for further proceedings consistent with [its] opinion ... as modified by the opinion of the Supreme Court". (emphasis added)

On appeal from the district court's judgment on remand, the court of appeals affirmed again every substantive element of the sanctions decision below, but sought to retailor its decision and those of the district court to comply -- facially, at least -- with this Court's decisions before remand. Proceeding from the curious premise that it had "determined on the prior appeal that the offending papers signed by [plaintiff] violated an objective standard of reasonableness" (compare 51a with 176a, n. 1), the court affirmed all sanctions against plaintiff. The court then disregarded the litany of documents signed by plaintiff and LeFlore, on which the district court purported to rely, and made no mention whatever of the trial or plaintiff's testimony and depositions, on which every previous decision had improperly relied. Instead, it focused entirely upon plaintiff's affidavit and LeFlore's memoranda submitted in opposition to the motions for summary judgment two years before trial. It held:

> "...LeFlore signed the amended complaint, and Calloway's affidavit in opposition to the motion for summary judgment was prepared by LeFlore and was in effect incorporated by reference in LeFlore's memorandum of law and reply memorandum. The amended complaint raised the facsimile claim, and the papers in opposition to the motion for summary judgment effectively prevented the dismissal of the complaint. See 854 F.2d at 1463. The Rule 11 violation was thus a coordinated effort, and joint and several liability is entirely appropriate. Joint

> and several liability in no way relieves Calloway or his estate from his nondelegable obligations under Rule 11. While *Business Guides* might shed light on a claim for contribution, it has no bearing on the present issues." (177a)

The court of appeals also rejected LeFlore's argument that the district court's arbitrary assessment of sanctions (equal to 20% of all defendants' fees through trial) unrelated to any discrete event for which sanctions were imposed, constituted "impermissible fee shifting", and -- notwithstanding that three (3) defendants did not appeal or cross-appeal -- sua sponte increased sanctions for one (Peter S. Shukat), but not all, of the non-appealing defendants. Indeed, in this last regard, as the district court had made no such finding, the court of appeals itself supplanted the very discretion it held the district court had.

One further point should be made. A key finding of fact, publicly stressed in every decision below, was the courts' conclusions that plaintiff may have been mentally ill, and may have been merely attempting to accommodate his lawyers.[7] That finding, which the court of appeals held implied a heightened responsibility on his lawyers' part, permeated every dollar and cent of the sanctions below. At the hearing on remand, plaintiff's psychiatrist testified that

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[7]The court was well aware of plaintiff's psychiatric history long before trial. Indeed, the special master's report, well before trial, fully examined and rejected any such suggestion of impairment.

plaintiff was not mentally disabled during any relevant time here, that his memory and recollection were excellent and that his judgment was not impaired at any time during the litigation. The conclusion that plaintiff was mentally disabled, never supported by any objective fact, was thereby negated by uncontradicted evidence. This, together with LeFlore's testimony on remand, necessarily led the district court to concede the true realities of this case: where it had earlier held (126a)

> "I conclude...that Calloway's inability to give consistent and forthright testimony resulted from his willingness to follow his attorney's advice...,"

it now held (206a)

> "While one might infer that Calloway's inability to give consistent and forthright testimony resulted from his willingness to follow his attorney's advice..., the evidence to support such an inference is insufficient." (emphasis added)

This grudging retraction of a conclusion that never was supported by any objective fact removed from the case a disturbing suggestion of overreaching that never should have been injected into this Rule 11 debate.

The court of appeals, on remand, did not find this relevant. (176a)

The Reasons for Granting Certiorari

I. This Court Should Resolve a Clear Conflict Between Rule 11 and Other Pre-Judgment Federal Rules of Civil Procedure

This case pointedly presents a direct conflict, not previously resolved by this Court, between Rule 11 and the plain language of other federal rules of procedure that should have preempted any sanctions here. Plaintiff ultimately did not win his case, but every decision below held that the action itself was not frivolous and no bad faith was involved. There is also no question that defendants here unsuccessfully challenged every fact and theory asserted by plaintiff, before the jury found against him, by motions which specifically called upon the trial court to scrutinize every aspect of plaintiff's claims, including the document tampering allegation for which sanctions were sustained. The sanctions imposed thus fly in the face of Rule 16, Rule 50 and Rule 56, under whose standards the case was repeatedly tested and survived.

This conflict can -- and should -- be resolved now, as it is not only important (and determinative) in this litigation, but will continue to impact every other litigation in which federal practitioners should be permitted to rely on the law of the case (established as they proceed) without fear of later retribution if they do not ultimately prevail. While the most recent amendments to Rule 11, effective

December 1, 1994, have attempted to resolve an equally troubling conflict that existed between Rule 11 and the federal rules for discovery (see Amended Rule 11(d), (214a), they do not even attempt to resolve these contradictory applications here.

The writ sought also presents this important question of law, unfettered by any pleading or other paper that was "unmasked", or shown to be false, in depositions or at trial; the Court need only determine whether sanctions pursuant to Rule 11 may properly be imposed after a lengthy and complex trial, where motions for summary judgment and directed verdict were denied, without regard to other collateral factual issues.

Finally, the record below not only confirms good and sufficient reason for each of the trial court's denials of defendants' motions before and during the trial, but illustrates clearly in every instance Rule 11's misapplication here. Rule 56 itself specifically provides:

> "When a motion for summary judgment is made..., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." (224a-225a)

Had plaintiff simply proffered his amended complaint, and no more, summary judgment would have followed; once plaintiff attested to "specific facts showing that there [was] a genuine issue for trial", the pleadings themselves no longer had any Rule 11 relevance.

Here, of course, plaintiff submitted a fourteen (14) page affidavit in opposition to defendants' motions for summary judgment which attested that his amended complaint was not intended to evade any previous findings on the merits (as there were none), but was drawn and filed only after plaintiff and LeFlore saw the original documents involved (which had been produced in other proceedings), thereby corroborating his own belief that the documents had been altered after he signed them[8]. He further swore that he never signed the agreements in the forms upon which defendants purported to rely, and called upon defendants to produce the original agreements he did sign. Plaintiff also stated that he never signed other agreements in his individual capacity, but only signed such agreements as an officer of Netta Productions, Inc. ("Netta"), a company formed by plaintiff through which he intended to perform

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[8]LeFlore testified on remand, as well, that plaintiff's initial complaint did not allege document tampering -- although plaintiff insisted there was -- because he did not then have sufficient corroboration, in LeFlore's view, for LeFlore to sign a complaint that alleged it. LeFlore's personal, physical inspection of the originals, in other proceedings, provided clear, unimpeachable corroboration of document tampering. No more could reasonably be expected.

personal services. Plaintiff's affidavit also unabashedly disclosed to the court at the time all facts on which he relied. He did not suggest (or otherwise seek to imply) any additional support for his document tampering allegation. So far as the case was concerned, the court had before it precisely the same facts on which LeFlore relied in signing plaintiff's amended complaint.

If, as the opinions below hold, the trial court denied summary judgment on the strength of the "document tampering" allegations to which plaintiff attested, the court necessarily found under Rule 56 more than "the mere existence of some alleged factual dispute", but rather "significant probative evidence" of the document tampering allegation, see *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986) (quoting *National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)), sufficient to go to a jury. *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986) cert. denied, sub nom, *Real v. Yagman*, 484 U.S. 963, 108 S.Ct. 450 (1987). That ruling is still presumptively correct and logically precludes any later post-trial conclusion, required for Rule 11 sanctions, that it was then "patently clear" that the document tampering allegation (or the claims which the court said depended on that allegation) had "absolutely no chance of success". By failing (or refusing for good reason) to impose sanctions then, the district court also necessarily found (implicitly and under the express language of Rule 11) that plaintiff's allegations were sufficiently investigated and grounded in fact to present genuine -- not frivolous --issues of fact.

Plaintiff also testified on numerous occasions, in depositions, that different signatures were not his, or reiterated that documents he signed had been altered without his consent. After that, and all other discovery, was complete, defendants challenged again the facts and theories asserted by plaintiff, not under Rule 56, but the court's explicit powers under Rule 16(c) to finalize the case for trial by, inter alia, the "formulation and simplification of the issues, including the elimination of frivolous claims or defenses" (emphasis added) (216a). Before trial began, on that authority, the trial court required plaintiff to further particularize every disputed allegation of fact. Plaintiff's April 1, 1986 amendment -- signed by Raymond A. Levites, one of LeFlore's partners -- did so, in part, as follows:

> "The irregularities with reference to the agreements effected by and at the directions of defendant Peter Shukat included physical separation and manipulation of the pages of the agreements to which plaintiff's signature had been affixed, and the alteration of the signature pages after plaintiff had signed them by obliterating one or more words with white-out, by retouching plaintiff's signature, a portion of which had been covered, and the insertion of the signature of defendant Klein, without plaintiff's knowledge, consent or expectation of any such changes".

His restatement was accepted by the court and the case proceeded to trial on that basis. The district court's forced

post-trial distinction between a "facsimile" allegation and "white-outs" was, by then, at the latest, entirely irrelevant to Rule 11.

Finally, at the conclusion of plaintiff's case, and later their own, defendants sought directed verdicts, not on the basis of any factual allegation, but the credible evidence adduced at the trial. Rule 50 provides:

> "If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained with a favorable finding on that issue." (220a)

But no such judgment was ordered, or could be.

The original June 1981 Agreements admitted in evidence at trial showed on their faces significant alterations (by whiting out) and suggested others. Calloway testified to numerous changes to the documents he had signed, including the removal of the word "Netta" from several places in the agreements; the whiting out of the word "by" next to his signature (which word would have reflected that he had signed in a representation rather than individual capacity); the omission of his initials; and his belief that his signature had been taken from one set of

originals and placed on another. Pearl Tytell, a questioned-document expert (whose qualifications were conceded by defense counsel), further testified that she examined the June 1981 Agreements initially in November 1984, and observed that there were many restaplings of the agreements, that the word "by" next to Calloway's signature had been whited out, that certain whiting out was clearly done after Calloway signed, that Calloway's signature had been partially whited out and then retouched, and that the word "Writer" was in certain places squeezed into a space for a word of only five letters (e.g., "Netta") and stated that when Calloway signed the agreements, the signature pages were not in the form in which they appeared at trial.

When the trial court denied defendants' motions for directed verdict and submitted the case to the jury, it once again necessarily found, consistent with Rule 50, that the case was sufficiently supported by law and fact to go to the jury. In short, it was not frivolous.

The Committee on Federal Courts of the Association of the Bar of the City of New York, comprised of practitioners who make their day to day living under the aegis and constraints of the federal rules of procedure, has emphatically stated:

> "[C]ompensatory sanctions after a trial should not be imposed if the claimant has survived a motion to dismiss or for summary judgment. Such awards smack of the worst form of Monday morning

> quarterbacking. In *Pavelic & LeFlore v. Marvel Entertainment Group*, the district court imposed sanctions of $200,000 on a plaintiff and his lawyer in a case in which the court declined to grant summary judgment for the defendant. It was a difficult case for the district court judge because the plaintiff's case was something of a moving target. However, it would seem in that case and other similar cases, that the burden rests with the district court under Rule 16 to shape the case.
>
> * * *
>
> "These techniques should be sufficient."

Comments on Federal Rule of Civil Procedure 11 and Related Rules, The Record of the Association of the Bar of the City of New York, Volume 46, Number 3, 267, 285 (April 1991)

Defendants' remedy, if any, after trial, was not sanctions under Rule 11, but to re-test under Rules 16(c) and 56(e) (each of which has its own specific provisions for sanctions) plaintiff's sworn attestations, LeFlore's memoranda and plaintiff's final proposed pre-trial order, signed by Levites. Had they done so, they would not have succeeded.

The hovering threat of Rule 11 retribution, sustained below, even after repeated tests of a claim (or, as here, a single non-essential allegation of fact) ensures continued friction between Rule 11, the other federal rules of procedure and proper standards of professional conduct.

Until this conflict is resolved, the more lengthy and complex the trial involved the more important this question becomes to seasoned (and other zealous) advocates, who seek only to fairly represent their clients within the bounds of professional responsibility.

This Court should resolve these conflicts now.

II. This Court Should Resolve a Direct Conflict Among the Circuits on Post-Judgment Motions for Sanctions Under Rule 11

The Courts of Appeals throughout the nation are in a quandary, completely at odds as to how best to resolve these conflicts between Rule 11 and other pre-judgment rules of federal procedure. In *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986) cert. denied, sub nom, *Real v. Yagman*, 484 U.S. 963, 108 S.Ct. 450 (1987), cited above, the Ninth Circuit reversed an award of sanctions of $250,000 under Rule 11 against an attorney in an action that survived motions for summary judgment, but was dismissed after plaintiff's case at trial. The court pointedly disapproved such a "reevaluated determination" after trial and after denials of motions for summary judgment, stating: 796 F.2d at 1183:

> "We must reverse the instant sanctions award because it ... poses a direct threat to the balance

between sanctioning improper behavior and chilling vigorous advocacy.

* * *

"[T]he complaint withstood several motions for summary judgment in front of Judge Lydick. The procedure utilized by Judge Real in imposing sanctions, therefore, was essentially an accumulation of all perceived misconduct, from filing through trial, with a reevaluated determination that it was far more serious than appeared at the time. The result of this procedure is a single post-judgment retribution in the form of a massive sanctions award."

To the same effect, in *Souran v. Travelers Insurance Co.*, 982 F.2d 1497 (11th Cir. 1993), the Eleventh Circuit held that previous denials of summary judgment, apparently without any unmasking there, likewise precluded any later determination that an action or claim was frivolous:

"[P]rior to Judge Newcomer's grant of summary judgment on count III and imposition of sanctions as to all counts, two other district court judges had occasion to consider the merits of Souran's suit. Judge Carr denied Travelers' motion to dismiss Souran's complaint....Later, Judge Green denied Souran's motion for summary judgment on count I, expressly acknowledging that 'the factual question whether the insurance policy was obtain[ed] under fraud has yet to be resolved.'

* * *

> "Rule 11 sanctions were not proper. See *Indianapolis Colts v. Mayor & City Council*, 775 F.2d 177, 182 (7th Cir.1985) (In the Rule 11 context, 'the fact that judges who have ruled on the merits of that pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable.')." (Footnote omitted)

982 F.2d at 1508. Other cases dealing with Rule 11 or sanctions imposed pursuant to other authorities take the same approach. See, e.g., *LeBeau v. Libbey-Owens-Ford Co.*, 799 F.2d 1152, 1158 (7th Cir. 1986), reh. denied, 808 F.2d 1272 (1987), *Soderbeck v. Burnett County*, 752 F.2d 285, 295 (7th Cir.), cert. denied, 471 U.S. 1117 (1985). But see *Jennings v. Joshua Independent School District, et al.*, 948 F.2d 194, (5th Cir. 1991), (the district court denied defendants' motions for summary judgment and later imposed sanctions against plaintiff, after a verdict for defendants, in part, on the grounds that "the outcome was foreseeable by plaintiff's attorney, if it was not entirely plain to plaintiff...." 948 F.2d at 199; sanctions sustained under Rule 11, but limited defendants' recoverable fees to those they incurred before summary judgment was denied).

These cases automatically preclude sanctions here, as there were other trial judges who denied summary judgment there; the judge who later imposed sanctions here was the very same judge who had earlier ruled to the contrary.

This is precisely the approach taken in *Media Duplication Service v. HDG Software, Inc.*, 928 F.2d 1228, 1240 (1st Cir. 1991), where the First Circuit held, without equivocation:

> "It is black letter law that a party cannot survive summary judgment by resting on mere allegations, but must establish specific facts by affidavit or otherwise. See Fed.R.Civ.P. 56(e).
>
> * * *
>
> "To survive summary judgment, HDG must have shown that there was sufficient evidence such that 'a reasonable jury could, on the basis of the proffered proof, return a verdict' in its favor." (citations omitted)

The court of appeals here specifically held that the trial court's rulings did not preempt Rule 11 sanctions. In so holding, it placed the Second Circuit in square disagreement with the Courts of Appeals for the Seventh, Ninth and Eleventh Circuits.

The writ sought should thus issue to resolve this inter-circuit dispute.

III. The Court of Appeals Exceeded (and Disregarded) Its Mandate Here

The remaining questions are inextricably bound up with the others. When this Court reversed the last time, in *Pavelic & LeFlore v. Marvel Entertainment Group, et al.*, 493 U.S. 120, 110 S.Ct. 456, (Appendix D) its mandate directed the court of appeals, on remand, to follow the language and "plain meaning" of Rule 11. It did not do so.

Rule 11 provides:

> "If a pleading, motion or other paper is signed in violation of this rule, the court ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction...." (209a-210a)

While this language might permit sanctions against an attorney "who signed" an offending paper, as well as his client, it does not permit sanctions against an attorney where plaintiff is the same person "who signed" the offending paper. The Rule's permissive "or both" also does not change this conclusion: where plaintiff (and not his attorney) "signed" the affidavit, there is no "both" for sanctions, for joint and several liability. Were this not clear from the language of the Rule itself, it surely became clear after *Business Guides, Inc. v. Chromatic Communication Enterprises, Inc.*, 498 U.S. 533, 111 S.Ct. 922 (1991), in which this Court held that a represented party bears a non-

delegable duty under Rule 11 which cannot be foisted upon his attorneys.

Old notions of common-law sharing of liability where there can be no delegation of duty or responsibility, either attorney's or client's, are particularly inappropriate. As this Court held in *Business Guides*, Rule 11 "strikingly departs from normal common-law assumptions... to authorize punishment only of the party upon which the duty is placed." (emphasis added)

Even accepting the conclusion that plaintiff violated Rule 11 by signing affidavits in opposition to the motions for summary judgment, LeFlore did not sign that affidavit and, under *Business Guides*, it may not be attributed to LeFlore.

LeFlore did sign memoranda of law, however, but such memoranda of law, signed by LeFlore, played no role in the case. While it is true that LeFlore's memoranda quoted and otherwise argued from plaintiff's affidavit, there can be no question that summary judgment could not be denied on that basis. Summary judgment was only denied on the basis of plaintiff's affidavit, not anything said in LeFlore's memoranda. For this obvious reason, the district court's decision on summary judgment did not even mention LeFlore's memoranda.

Finally, in *Business Guides*, this Court held that Rule 11 is limited to the discrete event which might be sanctionable. There again this Court was clear:

> "Rule 11 sanctions are not tied to the outcome of litigation: the relevant inquiry is whether a specific filing was, if not successful, at least well founded. Nor do sanctions shift the entire cost of litigation; they shift only the cost of a discrete event.... As we explained in Cooter & Gel: 'Rule 11 is not a fee-shifting statute....' A Movant under Rule 11 has no entitlement to fees or any other sanction.'" (Emphasis added.)

498 U.S. at 553, 111 S.Ct. at 934. Rule 11 simply cannot be used to reallocate a successful party's attorney's fees, or rest upon any generalized concept of fee shifting: it may only be used to "shift...the cost of a discrete event."

Plaintiff's affidavit in opposition to defendants' motions for summary judgment was the only "discrete" event for which the court of appeals affirmed sanctions; defendants cannot use that event to shift their fees for all that followed.

Finally, Peter S. Shukat, Scott Shukat and the Shukat Co., Ltd. prevailed on their motion to dismiss the amended complaint well before plaintiff's affidavit. They were therefore dismissed from the action by plaintiff and never had standing to seek sanctions for the period in which

they were no longer parties-defendant. When they rejoined the action as defendants, on the eve of trial, the district court made crystal clear that their re-entry was not based upon anything said in plaintiff's affidavit. It held:

> "Pendant jurisdiction will be exercised only over Calloway's claim against Peter, Scott and SCL for fraud and misrepresentation in connection with the June 8, 1981 option agreement because only with respect to this claim does there exist the requisite common nucleus of facts. Since the facts regarding the fraud claim of Calloway and that of third-party plaintiffs against Peter, Scott and SCL are practically identical and since these issues have been fully developed by discovery on the third-party complaint, there will be no prejudice to the third-party defendants in permitting the reinstatement of this particular claim." 111 F.R.D. 637, 650 F. Supp. 684 (S.D.N.Y. 1986)

To the extent Peter S. Shukat, Scott Shukat and the Shukat Co., Ltd. remained third-party defendants, they must look to the third-party plaintiffs, (not plaintiff or his attorneys) for recompense.

The claims against the Marvel defendants were not dismissed and continued through trial, but plaintiff's claims against them also did not depend upon his affidavit. First, the court of appeals specifically ruled that good and sufficient claims remained through trial against the Marvel

defendants. Second, when the district court required further clarification of plaintiff's claims in his proposed pre-trial order, then rejected any forgery claim and, thereafter, submitted the case against them to the jury, it necessarily determined that plaintiff's affidavit was irrelevant. Their fees through trial are thus unconnected to any "discrete" event upon which sanctions were based. Finally, even if any paper could be identified from which sanctions might flow, the sums sought are without merit. If, as the court of appeals found, the "facsimile" claim was abandoned before trial and the case was ultimately submitted to the jury without any such claim, it begs credulity for any defendant to suggest that the "facsimile" claim was a factor at trial.

The court's decision on remand does not even attempt to make this analysis or hold defendants to the "discrete" events for which they seek sanctions. This refusal is particularly strange in view of this Court's unambiguous holding in this regard.

IV. The Court of Appeals Disregarded this Court's Other Controlling Decisions

As well established and fundamental as this Court's plain language rule is the rule that district courts are bound on remand by the court of appeals' mandate. As long ago as *Morley Construction Co., v. Maryland Casualty Co.* 57 S.Ct. 325 (1937) this Court held:

> "Without a cross-appeal, an appellee may 'urge' in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087. What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain...."

57 S.Ct. at 327-328. This holding is still law. But here, too, the district court ignored that constraint.

In remanding this case for reconsideration, the court of appeals specifically held:

> "On the remand that we have ordered in Calloway's reinstated appeal, Judge Sweet, applying the legal standards described above, should determine what portion, if any, of the $200,000 total sanctions is the responsibility of Calloway and impose either no sanctions on him or an appropriate amount between zero and the $100,000 originally imposed. If he revises the sanction against Calloway from the $100,000 originally imposed, he should then

consider whether the attorneys should be liable for that portion of the $100,000 no longer outstanding as to Calloway. We believe this is an issue fairly raised by the Marvel defendants' cross-appeal that seeks, inter alia, an increase in the sanctions imposed on the attorneys. (emphasis added)

* * *

"We also remand the issue of the attorneys' joint and several liability for the amounts owed by Calloway, if any, after remand....Whether LeFlore and the firm should be jointly and severally liable for sanctions imposed on Calloway, in addition to the separate judgment against them, however, does fairly arise from Calloway's appeal." (emphasis added) (57a-58a)

Peter S. Shukat, Scott Shukat, The Shukat Company, Ltd. and Michael Klein did not appeal (or cross-appeal) from the district court's initial judgment, pursuant to which sanctions were imposed after trial against plaintiff and, separately, his law firm and LeFlore. They were accordingly foreclosed on remand from any permissive increase or reallocation of those sanctions originally imposed which might be available to the other appealing defendants.

The remaining defendants -- Marvel, Galton and Brodax -- were similarly constrained on remand, notwithstanding the fact of their cross-appeals. While it is clear that the court of appeals remanded the case for their benefit to consider "whether the attorneys should be liable for that

portion of the $100,000 no longer outstanding as to Calloway", there was no such reduction in Calloway's sanctions. Thus, they gained nothing by their cross-appeals. The additional fact that the district court imposed joint and several liability should have conferred no benefit either, as that did not "arise" from their cross-appeals, only the reinstated appeal by plaintiff. Finally, in this regard, it should have been clear to the court of appeals that even its remand for plaintiff's benefit made no sense, as joint liability itself confers no benefit on a joint tort feasor; it only benefits others who seek to enforce a judgment.

On these issues as well, the court of appeals should be reversed.

CONCLUSION

For the foregoing reasons, petitioner, Ray L. LeFlore, an attorney and a member of the Bar of this Court, respectfully asks that the Petition be granted.

Respectfully submitted,

RAY L. LEFLORE, *Pro Se*
489 Fifth Avenue
New York, New York 10017
(212) 319-7760

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 275, 385—August Term, 1987

(Argued October 28, 1987 Decided August 12, 1988)

Docket Nos. 86-7752, 86-7754, 87-7262

NORTHERN J. CALLOWAY, individually and on behalf of LMN PRODUCTIONS, INC.,

Plaintiff-Appellant, Cross-Appellee,

—v.—

THE MARVEL ENTERTAINMENT GROUP, a division of CADENCE INDUSTRIES CORPORATION, JAMES GALTON, AL BRODAX, MICHAEL S. KLEIN, LUIS QUIROS, THE SHUKAT COMPANY, LTD., SCOTT SHUKAT and PETER S. SHUKAT, ESQ.,

Defendants-Appellees,

THE MARVEL ENTERTAINMENT GROUP, a division of CADENCE INDUSTRIES CORPORATION, JAMES GALTON and AL BRODAX,

Defendants-Appellees, Cross-Appellants.

THE MARVEL ENTERTAINMENT GROUP, a division of CADENCE INDUSTRIES CORPORATION, JAMES GALTON, AL BRODAX, MICHAEL S. KLEIN, LUIS QUIROS and LMN PRODUCTIONS, INC.,

Third-Party Plaintiffs-Appellees,

—v.—

THE SHUKAT COMPANY, LTD., SCOTT SHUKAT and PETER S. SHUKAT, ESQ.,

Third-Party Defendants-Appellees,

THE SHUKAT COMPANY, LTD., and SCOTT SHUKAT,

Third-Party Defendants-Appellees, Cross-Appellants,

PAVELIC & LEFLORE (now dissolved), counsel at trial for plaintiff,

Appellants-Cross-Appellees,

RAY L. LEFLORE, individually and as a partner of PAVELIC & LEFLORE (now dissolved),

Appellant-Cross-Appellee.

Before:

FEINBERG, *Chief Judge*,
NEWMAN and WINTER, *Circuit Judges*.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) imposing: (i) sanctions of $100,000 under Rule 11 and $23,000 under 28 U.S.C. § 1927 (1982) against the plaintiff's attorney and his law firm; and (ii) sanctions of $100,000 under Rule 11 and $10,000 under 17 U.S.C. § 505 against the plaintiff. We affirm the imposition of Rule 11 sanctions against the attorney individually on the ground that he failed to make a reasonable investigation before repeatedly putting forward a now admittedly untrue factual claim. We also hold that the district court properly imposed sanctions on the attorney's law firm. We *sua sponte* reinstate the dismissed appeal from Rule 11 sanctions by the now pro se plaintiff, vacate the Rule 11 sanctions imposed against him, and remand for a hearing on whether Rule 11 sanctions should have been imposed on him. The hearing on remand shall also consider the question of whether the attorneys should be jointly and severally liable for sanctions imposed on the plaintiff. We reverse the sanctions imposed against the law firm under 28 U.S.C. § 1927 (1982) for delay in accepting a settlement offer that provided full relief, because the release executed as part of the eventual settlement extinguished the pending motion for sanctions. On appellees' cross-appeal for increased sanctions we remand to determine whether the attorneys should be liable for any sanctions from which the plaintiff is relieved on remand.

WILLIAM PIEL, New York, New York (Robert J. Katz, Arline Mann, Merle M. Martin, Sullivan & Cromwell, New York, New

York, of counsel), *for Appellant-Cross-Appellee Ray L. LeFlore.*

RADOVAN PAVELIC, New York, New York, *Pro Se for Appellant-Cross-Appellee Pavelic & LeFlore (now dissolved).*

ROBERT B. MCKAY, Santora & McKay, New York, New York, *for Defendants-Appellees, Cross-Appellants The Marvel Entertainment Group, James Galton and Al Brodax.*

NORMAN B. ARNOFF, New York, New York (Linda K. Brockett, Rosilyn, Newman, Arnoff & Siskind, New York, New York, of counsel), *for Third-Party Defendant-Appellee Peter S. Shukat, Esq.*

SOL V. SLOTNIK, Pomerantz & Slotnik, New York, New York, *for Third-Party Defendants-Appellees The Shukat Company, Ltd. and Scott Shukat.*

I. SCOTT BIELER, New York, New York (E. Michael Bradley, Brown & Wood, New York, New York, of counsel), *for Defendant-Appellee Luis Quiros.*

WINTER, *Circuit Judge*:

This appeal and cross-appeal require us principally to decide whether sanctions of $200,000 were properly imposed under Rule 11, Fed. R. Civ. P., on an attorney, his firm and his client. We also address the question of whether sanctions may be imposed under 28 U.S.C.

§ 1927 after a case has been settled and dismissed. The sanctioned attorney, Ray L. LeFlore, appeals from Judge Sweet's award of $50,000 in sanctions against him individually and $73,000 ($50,000 under Rule 11, $23,000 under Section 1927) against his now-dissolved law firm, Pavelic & LeFlore. LeFlore's former law partner, Radovan Pavelic, also appeals the award of $73,000 in sanctions against Pavelic & LeFlore, arguing that Rule 11 sanctions can be imposed only against the signer of a pleading or paper and not against the signer's firm. Judge Sweet also imposed sanctions against LeFlore's former client and the plaintiff in this case, Northern J. Calloway, of $100,000 under Rule 11 and $10,000 under 17 U.S.C. § 505 (1982). Calloway's pro se appeal has been dismissed for failure to prosecute. A cross-appeal seeking to increase the amount of sanctions against LeFlore, his firm and Calloway has been filed by defendants-appellees, cross-appellants The Marvel Entertainment Group ("Marvel"), an animation and motion picture company that is best known for its comic books; James Galton, the president of Marvel; and Al Brodax, a consultant to Marvel (collectively "the Marvel defendants"). Judge Sweet's decisions are reported at 111 F.R.D. 637 (S.D.N.Y. 1986) and 650 F. Supp. 684 (S.D.N.Y. 1986).

OVERVIEW

Because an overview of the underlying litigation is essential to an understanding of the issues, we briefly summarize the proceedings before setting them out in detail. This acrimonious litigation involved scattershot allegations by the plaintiff of copyright infringement, defamation, civil conspiracy, tortious interference, misrepresentation, fraud, breach of fiduciary duty, for-

gery and document tampering. Calloway's action sought $11 million in compensatory damages and $33 million in punitive damages from: Calloway's two business partners, Michael S. Klein and Luis Quiros; his theatrical agent, Scott Shukat; his longtime attorney, Peter Shukat; and the Marvel defendants. The core issue was whether the Marvel defendants had infringed Calloway's copyright in a script for a proposed animated science-fiction movie musical, "The Skyrider."

Calloway's case was at all times very weak. A principal vulnerability stemmed from the fact that the original complaint had attached to it as exhibits photocopies of written contracts between Calloway and various defendants. These copies indicated on their face that Calloway had sold all his rights in "The Skyrider" to LMN Productions, Inc. ("LMN") and the authenticity of these copies was not challenged. Because LMN had transferred those rights to the Marvel defendants, their use of Calloway's copyrighted work could not constitute actionable infringement. The original complaint was dismissed on technical grounds, however, and an amended complaint was filed that denied that plaintiff had signed the agreements in question. Specifically, it alleged that Calloway's former attorney, Peter Shukat, had without Calloway's authorization or knowledge, "affixed a facsimile of plaintiff's signature to a series of documents." We will refer to this claim as "the facsimile claim." The facsimile claim was then successfully relied upon by Calloway to defeat a motion for summary judgment. The facsimile claim was, however, abandoned before trial but replaced by two new claims. In these claims Calloway admitted that he had signed the contracts. The first new claim alleged that the contracts had been altered by various means, including white-out, after they were signed. We will refer to this as

"the white-out claim." The second new claim alleged that fraudulent misrepresentations by Peter Shukat caused Calloway to sign the contracts.

After a six-week trial, the jury returned a verdict for the defendants. The successful defense of this litigation cost the defendants over $900,000. They sought this amount in full in post-trial motions for sanctions against Calloway and his lawyers, LeFlore, who began this action on Calloway's behalf, and the firm of Pavelic & LeFlore, which had been formed in October 1984 and represented Calloway thereafter. Pavelic & LeFlore continued to represent Calloway in defending the motions for sanctions notwithstanding an obvious conflict of interest. Judge Sweet granted the motions in part and imposed sanctions under Rule 11 for the pursuit of the facsimile claim. These amounted to $50,000 on LeFlore, and $50,000 on Pavelic & LeFlore. An additional $23,000 of sanctions was imposed on the firm under 28 U.S.C. § 1927 for failure to accept a settlement offering full relief from Quiros. A separate judgment for sanctions in the amount of $110,000 was imposed on Calloway. Of this, $100,000 was imposed under Rule 11 and $10,000 under 17 U.S.C. § 505, which authorizes an award of fees to a prevailing party in a copyright action. LeFlore and Pavelic appealed, and the Marvel defendants cross-appealed. Calloway filed a pro se appeal, but that appeal was dismissed for lack of prosecution.

We affirm the award of sanctions against LeFlore and his firm. *Sua sponte*, we reinstate Calloway's appeal with regard to Rule 11 sanctions. LeFlore and his firm had a blatant conflict of interest and should have withdrawn as Calloway's counsel in defending the motions for sanctions. Because of this representation, no argument was

made on Calloway's behalf that LeFlore was solely responsible for pursuit of the facsimile claim, notwithstanding considerable evidence supporting that view. Nor was an argument made that even if sanctions should be imposed on Calloway, LeFlore and his firm should be jointly and severally liable for them. We vacate the Rule 11 sanctions against Calloway and remand for a determination of those issues. On remand the district court shall also determine whether, if the sanctions against Calloway are reduced, the lawyers should be liable for those sanctions from which Calloway is relieved. Finally, we reverse the sanctions imposed against Pavelic & LeFlore under 22 U.S.C. § 1927 (1982).

BACKGROUND

1. *The Parties and "The Skyrider" Project*

Because LeFlore takes the astonishing position that he never advanced the facsimile claim, it is necessary to describe the parties and transactions underlying this litigation in what would otherwise be unnecessary detail. The plaintiff, Northern J. Calloway, is an actor best known for his role as David on the children's television program "Sesame Street." In 1979, Calloway became interested in developing a motion picture, "The Skyrider," that would combine animation, science fiction and music. Although Calloway had appeared in several movies, he apparently had no prior experience in film production, animation, merchandising or budgeting. Nor had he ever written a screenplay. Calloway's initial efforts to launch "The Skyrider" project consisted of writing songs in collaboration with a friend, Gavin Spencer, obtaining futuristic drawings from an artist, Sammis McLean, and hiring one David Roth, whom Calloway had met by chance at the

Hayden Planetarium, to compose a brief story outline. Calloway also prepared a rough "presentation book," and, with the assistance of his agent, Scott Shukat, sought unsuccessfully to interest various motion picture companies in the project.

In December 1980, Calloway fortuitously met Luis Quiros, an insurance salesman, in the lobby of a Manhattan office building. Soon thereafter, Quiros introduced Calloway to Michael Klein, a dentist and Quiros's neighbor on Long Island. Although neither Quiros nor Klein had experience in the movie business, the three men sought to interest various investors in financing "The Skyrider." In March 1981 Klein, through a neighbor, arranged to present the project to James Galton and Al Brodax at Marvel. Galton and Brodax expressed some interest in "The Skyrider" but stated that Marvel was not interested in financing a film at an estimated $5 million cost. Rather, Marvel wanted to use certain of the proposed film's characters in its comic books.

Sometime between June 8, 1981 and August 5, 1981, Calloway, Klein and Quiros formalized their relationship by signing a series of documents. These documents were prepared by Peter Shukat, Calloway's longtime attorney, and Egon Dumler, an attorney who specialized in preparing theatrical agreements. The first document, dated June 8 but executed and notarized on August 5, was a shareholder's agreement for LMN Productions, Inc., a corporation formed to finance and produce the film. The three remaining documents, the option agreement, the writer's agreement, and the music agreement, were all dated June 8. Calloway testified that he signed all four agreements on June 8, while Klein and Quiros maintained that none of them was signed until August 5. Calloway later admitted

that he signed a version of the shareholder's agreement on August 5.

During this period, Calloway was undecided, apparently for tax reasons, whether he would participate in the project as an individual or through a wholly-owned corporation that would provide his services, Netta Productions, Inc. ("Netta"). This uncertainty resulted in the option agreement, writer's agreement and music agreement undergoing several drafts, with some naming Netta as a party and others naming Calloway as a party. Peter Shukat testified that neither he nor Dumler used a word processing machine in preparing these documents. The final version of these agreements thus evidenced the use of "white-out" to make variations concerning Netta and Calloway as well as several typographical errors resulting from the failure to insert "Calloway" or "Writer" in place of "Netta."

The option agreement among LMN, Calloway and Gavin Spencer (who had written some music for the project) granted LMN an option to produce "The Skyrider" upon certain conditions precedent, including the raising of preproduction expenses within seventy-five days and the full production budget within one year thereafter. The option agreement incorporated the writer's agreement and the music agreement. The writer's agreement, which became effective on the exercise by LMN of the option, stated that Calloway, the "Writer," would grant to LMN, the "Producer," all rights to Calloway's services under the agreement and to all writings produced thereunder, including the right to alter such writings. The music agreement among LMN, Calloway and Spencer provided LMN with similar rights to the music for "The Skyrider."

On September 6, 1981, Scott Shukat, Calloway's agent, purporting to act on Calloway's behalf, signed documents extending until September 30, 1981 LMN's right to exercise the option. Calloway later claimed that this extension was invalid because he, Calloway, had signed the original agreements only in his capacity as an officer of Netta, and Scott Shukat had authority to grant such an extension only on Calloway's behalf as an individual, not as a corporate officer. That same month, however, at a meeting attended by Calloway, Klein, Quiros, Galton and Brodax, Marvel agreed in principle with all the parties, including Calloway, to produce "The Skyrider" at a $5 million budget. Marvel was to have artistic and budgetary control and pay any overage above $5 million. LMN was still to raise the initial $5 million.

In September 1981 the sole disagreement among the parties appears to have concerned the amount of computerized animation in the film, an expensive item. 111 F.R.D. at 644. Calloway apparently wanted to spend $12 million on the film, while Brodax contemplated a $5 million budget. Nevertheless, Calloway appeared willing to proceed with production of the movie at the $5 million figure. *Id.*

By mid-September 1981 and as a result of the extension, LMN had been able to raise the front money, although efforts to raise additional funding proved unsuccessful. As a result, Calloway received a check for $22,500 dated September 21 as his share of the front money, the largest amount he had ever received for his artistic services. The check to Calloway was made out to him personally and not to Netta. He reported it as income on his personal tax return.

In November 1981, Marvel prepared a new presentation book ("Marvel presentation") to assist in raising the $5 million. This book included Sammis McLean's futuristic drawings, David Roth's story outline, and a five-page introduction and brief conclusion or "bookends" written by Brodax. Klein and Quiros approved the contents of this book on LMN's behalf. It was the Marvel presentation that was alleged to have infringed Calloway's copyright.

A formal agreement between Marvel and LMN was signed on February 1, 1982. Galton signed on behalf of Marvel, and Calloway and Klein signed for LMN. The relationship between Calloway, Klein and Quiros had apparently soured somewhat by that time. Calloway disputed several items in the proposed budget for the film and agreed to sign the Marvel agreement only if it was placed in escrow with Peter Shukat, his attorney, until the disagreements were resolved. On February 9, after Calloway, Klein and Quiros had apparently resolved their differences, Peter Shukat released to Dumler, LMN's attorney, the Marvel agreements. By May, however, the LMN shareholders were again quarreling.

Calloway later claimed that he first saw the Marvel presentation at about this time and was particularly disturbed by the Brodax "bookends," which somewhat altered the story line of "The Skyrider." The Marvel presentation was generally based on Roth's original synopsis except that in the Marvel presentation, the protagonist, Sy Ryder, is a motorman on the 8th Avenue Line, who becomes Sky Rider, a space hero, while playing a video game in his dreary Manhattan apartment. The copyrighted screenplay written by Calloway and Roth, however, omitted "any reference to the worldy-realities of day-to-day existence on the planet Earth," Amended Complaint ¶ 29, while the

Marvel presentation included references to " 'cockroaches,' 'toilet[s] on the BMT,' 'indigestion,' 'mayhem' and 'sludge.' " *Id.* Calloway believed that, as a result, the Marvel presentation demeaned, cheapened and infringed his copyrighted material. It was this molehill of dissatisfaction that led to a mountain of litigation consisting of years of discovery, ten pretrial opinions, a six-week trial, and a record filling six cartons.

2. *The Lawsuit*

In August 1982 Calloway retained attorney Ray LeFlore to bring the suit underlying this appeal. The original complaint, filed in December 1982, and signed by LeFlore, named as defendants Klein, Quiros, Dumler's law firm of Dumler & Giroux, LMN, Peter Shukat, Scott Shukat, the Shukat Company, Ltd. ("SCL"), Marvel, Galton and Brodax. It alleged the willful infringement of Calloway's copyright ("Cause of Action" I), the malicious destruction of the entire value of his copyright (II), unauthorized use of Calloway's name (III), Peter Shukat's intentional breach of his professional obligations as Calloway's attorney (IV), Scott Shukat's and SCL's breach of their fiduciary duties (V), fraud (VI), knowing violation of plaintiff's escrow agreements (VII), and breach of contract (VIII). The complaint sought $11 million in compensatory damages, punitive damages in an unspecified amount, and costs and attorney's fees.

The original complaint included as exhibits the shareholder's, option, writer's and music agreements. No claim of document tampering, forgery or the use of a facsimile of Calloway's signature on any document was made. Although the exhibits were photocopies, the authenticity of the documents was undisputed, as was the genuineness of the signatures. Calloway's sole claims regarding these

agreements was that LMN had not properly exercised its option in "The Skyrider" within the agreed upon time because Scott Shukat did not have the authority to extend the option on behalf of Netta but only on behalf of Calloway as an individual.

From the very beginning, plaintiff's case suffered from obvious and grave weaknesses. Because "The Skyrider" was never produced, none of the defendants had profited, and most had lost money on the venture. (Calloway appears to have profited to the extent of $22,500.) The claim that the Marvel presentation had diminished, much less destroyed, the value of Calloway's copyright seemed entirely speculative. The existence of substantial damages was thus in doubt, no matter how powerful the evidence of actionable infringement might be. The liability portion of the case was also flawed, however. The option agreement granted LMN the right to use Calloway's copyrighted script in order to raise funds for the proposed film. The granting clause of the writer's agreement,[1] one of the two

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1 The granting clause provided:

> Writer hereby grants to Producer, exclusively and perpetually, all now or hereafter existing rights of every kind and character whatsoever, whether or not such rights are now known, recognized or contemplated, and the complete unconditional and unencumbered title throughout the world in and to: Writer's services pursuant to this agreement; any and all results and proceeds thereof; and any and all literary, dramatic and musical material, incidents, plots, dialogue, characters, action, gags, routines, ideas, inventions and other material written, composed, submitted, added, improvised, interpolated and invented by Writer hereunder.
>
> * * *
>
> Producer may add to, subtract from, arrange, rearrange, revise and adapt all such material in any manner, and Writer hereby waives the "moral rights" of authors, as said term is commonly understood. All such material and the world-wide copyright therein (including all renewals and extensions of such copyright) shall auto-

agreements incorporated into the option agreement, transferred to LMN all of Calloway's rights to "The Skyrider," including the right to "revise" the material "in any manner." LMN had in turn transferred those rights to Marvel. Calloway's entire copyright claim rested on the contention that Scott Shukat had authority to act only for Calloway personally, not for the corporation Netta, and that the September extension to LMN was invalid. However, Calloway himself agreed in his testimony that Netta was merely his "alter ego," and he had accepted the $22,500 check made out to him in his individual capacity after the extension. He reported this sum on his personal income tax return and deducted all business expenses relating to the Skyrider project on that return. Finally, his participation in meetings with Marvel well after the extension and his signing on LMN's behalf of a contract passing the rights to "The Skyrider" to Marvel further undermined his claim that the extension was invalid. Moreover, because Calloway's only federal claim was based on copyright infringement by the Marvel presentation and it was clear that many of the defendants, such as the Shukats, had not participated in or profited from the infringement, subject matter jurisdiction as to them was in doubt.

The copyright issue came to a head when the Marvel defendants moved to dismiss on the ground, *inter alia*, that the agreements attached to the copyright on their face permitted the use of Calloway's copyrighted work, including changes in the plot and characters. Because the Marvel defendants were the only alleged infringers and there was no colorable federal claim against the remaining defen-

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matically be and become the property of Producer and Producer shall be deemed to be author thereof, Writer acting entirely as Producer's employee for hire.

dants (who might in any event be unable to satisfy a large judgment), the contracts attached as exhibits to the complaint had become a considerable legal albatross around Calloway's action.

On June 30, 1983, Judge Sweet dismissed the complaint, not on the ground that the agreements authorized the alleged infringement, but on the technical ground that the complaint failed to plead copyright infringement with particularity by neglecting to specify the registration number of the copyright, and the dates and occasions on which the alleged infringement occurred.

An amended complaint, again signed by LeFlore, was filed on August 1, 1983. This complaint alleged that Calloway had "signed and initialed" a series of agreements on June 8, 1982 (¶ 44). However, it also stated that "[o]n or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981" that were different from the agreements Calloway had signed and initialed (¶ 52), and that "Shukat had no authority whatsoever to purport to affix plaintiff's signature to said documents . . . ." (¶ 53). This was the original assertion of the facsimile claim. The belated raising of this claim has been explained on the ground that only after LeFlore and Calloway saw the *original* agreements (the exhibits to the first complaint being photocopies), which had been produced in discovery, did they realize that a facsimile of Calloway's signature had been used. The facsimile claim, if believed, was of course a viable response to the Marvel defendants' contention that the agreements attached to Calloway's initial complaint authorized the Marvel presentation. A trier of fact, however, might well raise an eyebrow at the claim that the for-

gery went undiscovered until the original contracts were produced because their provisions were identical to those of the photocopies attached as exhibits to the original complaint.[2] It should also be noted that the original documents clearly showed the use of white-out in the text (the photocopies were made after the white-out). The amended complaint, however, made no claim involving the alteration of words with white-out.

The amended complaint repeated the host of legal theories against most of those involved in the Skyrider project, sought $11 million in compensatory damages and specified $33 million in punitive damages. Notwithstanding the gravely serious allegations of professional and felonious misconduct, however, which we summarize in the margin,[3] the gravamen of the complaint was still the federal claim of copyright infringement.

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2 The photocopies are identical in every respect to the originals produced by Dumler. The originals produced by Scott Shukat, which were also signed, differ in one respect from the Dumler originals. This difference is that on page 6 of the Shukat original of the Writer's Agreement in the fifth line of the second full paragraph, and the last line of the third full paragraph, the word "Writer" appears where in the Dumler original the word "Netta" appears. The reason for this minute inconsistency is that in the course of a markup intended to substitute Calloway in place of Netta as a party by changing the word "Netta" to "Writer," Dumler inadvertently overlooked two "Nettas" on page 6.

3 The first "cause of action" sought $11 million in damages from Marvel, Galton, Brodax, Klein and Quiros for infringing Calloway's copyright in "The Skyrider," and "maliciously destroy[ing] and tak[ing] from plaintiff the entire value of his copyright" by showing the Marvel presentation to various persons in the entertainment business.

The second cause of action sought $3 million in damages, plus $9 million in punitive damages, for defamation and violation of Calloway's "right to privacy." In essence, this claim was that the allegedly "vulgar references" in and "stereotypical appeal" of the Marvel presentation "irreparably damaged" Calloway's reputation.

(footnote continued)

On December 22, 1983, Judge Sweet dismissed the amended complaint as to defendants Peter Shukat, Scott Shukat, SCL and Dumler & Giroux for failure to state a

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The third cause of action named all of the defendants in a conspiracy to commit copyright infringement and claimed that "at Marvel's behest" Peter Shukat, plaintiff's attorney of ten years, was solicited to assist in the misappropriation of the copyrighted material (¶ 51), that Shukat "affixed a facsimile of plaintiff's signature to a series of documents" (¶ 52), that Klein, Quiros, Dumler, and the Shukats "together negotiated, drafted and purported to execute on plaintiff's behalf another series of agreements" (¶ 54), and that "plaintiff did not know that a series of false and deceptive agreements had been created by defendants." (¶ 56).

The fourth cause of action asserted that the "infringements, . . . slander and defamation . . . were knowing, willful and malicious," and sought $33 million in punitive damages.

The fifth cause of action accused Peter Shukat of "knowingly, violat[ing] his professional obligations to plaintiff and abus[ing] his positions of trust and confidence as plaintiff's own attorney" (¶ 72), and sought $11 million in damages.

The sixth cause of action asserted that SCL and Scott Shukat "knowingly . . . breached their fiduciary duties as plaintiff's managers" (¶ 74) and sought $11 million in damages.

The seventh cause of action was asserted derivatively on LMN's behalf. It admitted that: the June 8, 1981 agreements granted to LMN the rights in "The Skyrider," (¶ 76); admitted that LMN had successfully raised the $75,000 in front money (¶ 77); claimed that LMN had "secured both a guarantee of production and a commitment to fund the production of 'THE SKYRIDER,' in separate amounts of at least five million ($5,000,000) dollars" (¶ 77); concluded that the defendants had "unjustifiably interfered with LMN's contractual rights" and "maliciously destroyed" the project's value (¶ 78) and sought $5 million in damages (¶ 79). The complaint never stated who gave the $5 million guarantee of production and $5 million commitment to fund the production, although earlier in the complaint it was alleged that Marvel had proposed to produce the film at a $5 million budget (¶ 25).

The eighth cause of action accused Klein, Quiros and Dumler & Giroux of breaching their fidiciary obligations to LMN and sought $5 million in damages.

The ninth and final cause of action accused Klein and Quiros of misappropriating and wasting "substantial funds" of LMN. No dollar amount was provided.

federal claim of copyright infringement. He also dismissed the pendent state claims against those defendants. In doing so, he relied upon the failure of the complaint to allege that Peter Shukat had a financial interest in the infringing activities or that he had supervised, induced or materially contributed either to the production or distribution of the Marvel presentation. With respect to Scott Shukat, the amended complaint alleged in a single paragraph only that he had "directly contributed" to Marvel's creation of the infringing work. Amended Complaint ¶ 58. In an uncontradicted affidavit, however, Scott Shukat stated that he was not aware of the Marvel presentation until June 1982, months after it had been prepared and distributed, and that he did not know Marvel's Galton and had met Marvel's Brodax only once. Calloway never sought discovery or produced any evidence to rebut Scott Shukat's motion, even though the identical defense had been raised to the first complaint. With regard to Dumler & Giroux, Judge Sweet held that a law firm that negotiated agreements between the plaintiff and the alleged infringers could not be a contributory or vicarious infringer. As to the other defendants, Judge Sweet dismissed the third cause of action on the ground that there exists no distinct action for conspiracy under the Copyright Act, and he dismissed the fourth cause of action because punitive damages are not available in statutory copyright-infringement actions.

In a memorandum in opposition to defendants' motions to dismiss the amended complaint that was signed by LeFlore and filed October 19, 1983, LeFlore, *inter alia*, restated paragraphs 49 through 55 of the amended complaint alleging the facsimile claim. The memorandum then stated that: "The allegations quoted above leave no doubt that those documents on which plaintiff had been forced

to rely [in the original complaint] are not the agreements which plaintiff 'signed and initialed' on or about June 8, 1981 . . . ."

After discovery, the remaining defendants, Marvel, Galton, Brodax, Klein and Quiros, moved for summary judgment on the ground that the June 8, 1981 agreements between Calloway and LMN authorized their use of Calloway's copyrighted work. In a fourteen-page affidavit in opposition that was written by LeFlore and dated April 2, 1984, Calloway stated in Paragraph 6:

> I did not refer to, or annex, those documents which, I learned in the interim, had been contrived and forged by defendants. Instead, the Amended Complaint charged:
>
> "52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, backdated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire 'The Skyrider.' "
>
> The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: the option agreement, the writers agreement and the composition agreement, all dated June 8, 1981. . . .

Calloway further stated in Paragraph 7 of the affidavit:

> Based upon my review of the originals of these three documents, produced in other proceedings, I hereby reaffirm that I neither signed nor approved those agreements. Defendants should not, I submit, be enti-

> tled to claim reliance upon documents which I now know were forged and contrived to deceive.

After stating that the defendants should "produce for this Court the agreements I actually 'signed and initialed,' " agreements which, Calloway stated, reserved various rights to him, Calloway asserted that:

> Since all copies of the agreements I "signed and initialed" on or about June 8, 1981, were entrusted to Peter Shukat, once a defendant, I cannot now produce such agreements to the Court. I can state, nonetheless, that I never signed or authorized the signing of any "option" agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981.

No reference to the use of white-out or other alteration of the text of the documents was made anywhere in Calloway's affidavit.

Calloway's affidavit mentioned only briefly that Scott Shukat was not authorized to extend the option agreement. The briefs submitted on his behalf, however, made no mention of the issue of Scott Shukat's authority but instead relied upon the facsimile claim. Calloway's memorandum of law opposing summary judgment, also dated April 2 and signed by LeFlore, thus argued that:

> The only basis on which defendants could hope to obtain summary judgment in their favor is their claim that plaintiff signed or approved the agreements on which they purport to rely.
>
> Plaintiff's Affidavit, sworn to April 2, 1984, unequivocally attests that he neither signed nor approved the agreements on which defendants purport to rely.

> This Affidavit states: [repeats ¶¶ 6-7 of Calloway's Affidavit]. There could be no clearer statement that defendants have nothing authentic on which to rely.

Similarly, Calloway's reply memorandum of May 3, 1984, also signed by LeFlore, stated that:

> plaintiff has unequivocably affirmed that the documents on which defendants purport to rely were forged without plaintiff's knowledge or consent. Stated otherwise, defendants can find no support for their motions for summary judgment in rumblings about documents signed by others, a forced construction of language which plaintiff never approved, or any obvious disappointment by them at plaintiff's discovery of the originals of the documents which confirm they were signed by others.
>
> • • •
>
> Once it is shown, as it already has been, that plaintiff did not sign or approve any such document, defendants' only recourse is to claim-over against those individuals who either forged plaintiff's signature or represented they were authorized to sign for him.

If the motion for summary judgment had been granted, of course, the case would have ended. However, Judge Sweet denied the motion for summary judgment on July 3, 1984 because of the statements in Calloway's affidavit regarding the facsimile claim. He stated:

> Calloway does not dispute defendants' contention that the terms of the Option Agreement would authorize defendants' acts, but states by affidavit that he never signed or approved the Option Agreement and that Peter Shukat, without Calloway's knowledge,

affixed a facsimile of Calloway's signature to the agreement. Later in his affidavit, however, Calloway states that he "never signed or authorized the signing of any 'option' agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981." Calloway has not explained the inconsistency between these two statements. His having signed the Option Agreement "as an officer of Netta Productions, Inc." appears to be without significance in this context. Calloway annexed the Option Agreement as an exhibit to the original complaint and did not challenge the authenticity of the Option Agreement during earlier motions in this case. He appears to contend that he signed an option agreement on June 8, 1981, in which he reserved the right to make all artistic decisions concerning "The Skyrider," but that the agreement he signed was altered without his consent, and that he did not discover these alterations until after he filed the complaint.

Judge Sweet then stated that "Calloway has by a narrow margin put sufficient facts in contention to withstand defendants' summary judgment motion." Opinion by Judge Sweet dated July 3, 1984, at 2. However, he warned Calloway and LeFlore that "this court has awarded attorney's fees against a plaintiff who was found after trial to have pursued a claim in bad faith and without factual support" and that "[t]he court will not hesitate to award such costs if the facts are found after trial to warrant such an award." *Id.* at 3.

After the denial of summary judgment, Peter Shukat, Scott Shukat and SCL were brought back into the action after being named third-party defendants by the Marvel

defendants. In denying a motion to dismiss the third-party complaint, Judge Sweet specifically relied upon the fact that its allegations included the claim that Peter Shukat had affixed a facsimile of Calloway's signature to the June 8 agreements. Opinion of Judge Sweet dated January 29, 1985, at 2.

It appears, therefore, that but for the facsimile claim, the case would have been over. Because of that claim, the action continued as to eight defendants. On appeal, LeFlore disputes the conclusion that the facsimile claim was crucial by arguing that Judge Sweet denied the Marvel defendants' motion for summary judgment because of a claim of *post-signature* alterations in the text, the white-out claim, rather than the facsimile claim. However, the facsimile claim was the *only* alteration claim that had been made at the time of the summary judgment motion. The white-out claim was not made until two years later. The facsimile claim alone was thus the basis for Judge Sweet's decision to deny summary judgment, as his later imposition of sanctions expressly stated. *See* 111 F.R.D. at 647 & n.2.

In October 1984, LeFlore formed the partnership, Pavelic & LeFlore. Thereafter, pertinent papers in the case were signed:

PAVELIC & LEFLORE
By: *Ray L. LeFlore (s)*
(A Member of the Firm)
Attorneys for Plaintiff

Although LeFlore bore the laboring oar, his partner Radovan Pavelic did participate in various aspects of the case and at least two other lawyers, David Rees Gilliatt and Raymond L. Levites, appeared "of counsel" to Pavelic & LeFlore on Calloway's behalf.

In November 1984, LeFlore for the first time consulted a handwriting and document expert, Pearl Tytell. She not only declined to opine that Calloway's signatures on the contracts were forgeries but instead told LeFlore that they were "possibly" genuine. At trial, she testified that she never considered the signatures to be facsimile signatures.

Throughout the pretrial phase, various defendants sought clarification of the facsimile claim. Peter Shukat's interrogatories thus asked plaintiff to "identify and describe any and all authentic documents that plaintiff relied upon to evidence the forgeries and/or fraudulent alterations." In a response signed by LeFlore and dated April 22, 1985, Calloway, in an apparent but confusing attempt to distinguish between "forgeries" and "affixations of facsimiles," stated that:

> Plaintiff has never alleged any forgery of plaintiff's signature, nor is it alleged that any defendant, or defendants, fraudulently altered any document bearing any reasonable relationship to any document plaintiff ever executed on his own behalf or on behalf of Netta Productions, Inc.
>
> Paragraphs 51 through 53 and paragraph 55 of the amended complaint state as follows: [restate ¶¶ 51-53, 55 of amended complaint].
>
> * * *
>
> Until plaintiff is provided discovery of the facts in this action, by oral testimony and further verification of the absence of any basis for authentication by defendant of relevant documents, plaintiff cannot now answer further in this regard, except specifically states that Peter Shukat was then the only person with access to, or ability to provide the other defendants, such facsimiles from the documents actually signed

> by plaintiff on or about June 8, 1981, and refers to those documents presently held under seal by the United States District Court, Southern District of New York, which evidence the affixation of a facsimile of plaintiff's signature thereto, and evidence defendants' fraudulent intent in respect thereto.

Answers and Objections of Plaintiff Northern J. Calloway to Defendant Peter Shukat's Interrogatories at 4-5. Moreover, one of Calloway's answers to Luis Quiros's interrogatories, signed by LeFlore and sworn to by Calloway on June 3, 1985, stated that the original documents "evidence the affixation of a facsimile of plaintiff's signature thereto." The answer also asserted once again that "[p]laintiff did not sign such documents."

Calloway's deposition was taken in June 1985. His testimony regarding the facsimile claim was hardly clear, but he did unmistakably state that part of that claim involved the existence of signatures that "imitated" his signatures. He failed, however, to provide an evidentiary basis for that claim. For that basis, Calloway relied upon his inability to recognize his signature, Peter Shukat's possession of the documents after their execution, and, disturbingly, his, Calloway's, belief, that a handwriting expert whom he did not know had informed LeFlore that the contracts bore "improperly affixed facsimile signatures." LeFlore knew at the time of this deposition that Tytell had *not* supported the facsimile claim.

Peter Shukat, who was alleged in the facsimile claim to have committed felonious acts that, if true, would more than justify disbarment, sought unsuccessfully during the pretrial stage to obtain the withdrawal of paragraph 52 of the amended complaint. In a June 21, 1985 letter, his counsel wrote to LeFlore that Rule 11 sanctions would not

be sought for the facsimile claim if it was withdrawn. Similarly, in a July 12, 1985 letter, the same counsel sent an opinion from Paul Osborn, a handwriting expert, to all counsel indicating that Calloway's signatures were in fact genuine.

Notwithstanding the opinions of Tytell and Osborn and the reliance of Calloway on an expert's opinion that was never given, LeFlore persisted in asserting the facsimile claim. Calloway's proposed pretrial order, signed by LeFlore, thus restated the allegation in the amended complaint that Peter Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents." No reference was made to a white-out claim or any variation thereof. At the final pretrial conference, one week before the start of the trial, counsel for Marvel asked that LeFlore clarify the facsimile claim. He stated:

> At different times, Mr. Calloway has said, yes, that's my signature, and other times he has said no, that's not. Mr. LeFlore at times has said, we are claiming forgery, and at other times he has said we are not. They sometimes say, that's a facsimile signature, whatever that means, and at other times they said no.

The district court thereupon explicitly directed LeFlore to "state the document as to which you claim there is an irregularity and what the irregularity is." In a letter amendment to plaintiff's pleadings and contentions submitted by Pavelic & LeFlore on April 1, 1986 and signed by Raymond L. Levites, now LeFlore's co-counsel for trial purposes, Calloway abandoned the facsimile claim by not mentioning it. The letter stated:

> The irregularities with reference to the agreements effected by and at the direction of defendant Peter Shukat included physical separation and manipula-

tion of the pages of the agreements to which plaintiff's signature had been affixed, and the alteration of the signature pages after plaintiff had signed them by obliterating one or more words with white-out, by retouching plaintiff's signature, a portion of which had been covered, and the insertion of the signatures of defendant Klein, without plaintiff's knowledge, consent or expectation of any such changes.

Thereafter, Peter Shukat released the June, 1981 agreements without compliance with his undertaking to safeguard them pending Calloway's approval.

Defendant Peter Shukat did all of the foregoing, aided and abetted by the other defendants, both to defraud Calloway and to misappropriate THE SKY-RIDER.

* * *

Plaintiff signed these documents only because defendant Peter Shukat intentionally misrepresented to him that he was obligated to do so and had no choice in the matter.

This letter thus raised for the first time the white-out claim, which asserted that the contracts in question had indeed been signed by Calloway but that the text had been altered by white-out and separation or manipulation of the pages. Because the use of white-out is obvious on the originals, LeFlore and Calloway must have seen the "alterations" at the time of the filing of the amended complaint some two and one-half years before but had never raised them as an issue. In addition, the separation and manipulation of pages, if it happened, occurred before making the photocopies attached to the original complaint but also was never raised. Moreover, the claim that oral misrepresentations by Peter Shukat had caused Calloway to

sign the June 8 agreements had also not been made in the preceding three years and three months of litigation. The letter thus revolutionized Calloway's claims, fully justifying the defendants' view that they had been subject to moving-target litigation.

The case was tried before a jury from April 7, 1986 through May 13, 1986. Eighteen witnesses and about 250 exhibits provided the evidence. In a portion of his deposition read at trial, Calloway stated that he understood the term facsimile signature to mean "a signature placed on one document and then put on to another document" or signatures that "imitate my signatures." On cross-examination, Calloway agreed that he had "no real evidence" other than what LeFlore had told him that Peter Shukat had "forged" his signature or "placed a facsimile signature" on the agreements in question. Calloway was referring to his deposition testimony that LeFlore told him that a handwriting expert had concluded that facsimile signatures had been improperly affixed to the contracts.[4] In

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4 His testimony reads as follows:

Q. You have no real evidence to believe that Peter Shukat forged your signature, do you?

A. [Calloway] I have the, I only have the evidence that the—

Q. Please answer the question, yes or no.

MR. LEFLORE: Objection, your Honor.

THE COURT: Overruled.

Q. Yes or no?

A. No.

Q. And you have no real evidence to believe that he placed a facsimile signature of yours on the June 8, 1981 contract documents, do you?

MR. LEFLORE: Your Honor, would you instruct the witness as you did yesterday.

addition, there was substantial evidence that Calloway was mentally ill and had engaged in bizarre behavior unconnected to the litigation.

Although the facsimile claim was not pursued at trial, Calloway did introduce evidence designed to show that Peter Shukat had altered or manipulated the text of the June 8, 1981 agreements with white-out. The purpose of this evidence was to show that the agreements had been signed by Calloway only on behalf of Netta and therefore that Scott Shukat did not have authority to extend the option in September 1981. Central to the case, however,

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THE COURT: No.

A. Yes.

Q. And you have no real evidence to believe that he contrived the June, 1981 contract documents.

A. Yes, I do.

Q. You have no real evidence to believe that other than what Mr. LeFlore told you, true?

A. No.

Q. Do you recall giving these sworn answers to these questions in this courthouse on June 13, 19[85] . . .

• • •

"Q. Did a handwriting or document examiner ever confirm to you your claim or contention that the documents attached to Shukat 3 bear improperly affixed facsimile signatures of yours?

"A. Not to me, no.

"Q. To anyone?

"A. Yes.

"Q. Who?

"A. Mr. LeFlore."

• • •

Q. Was that your sworn answers to my questions in this courthouse on June 13, 1985?

A. Yes, they were.

was the eleventh hour claim of oral misrepresentations by Peter Shukat.

At the close of Calloway's case, defendants moved for a directed verdict on all of the claims against them. Despite "serious reservations" about many of the claims, Judge Sweet denied the motion except for the claim that Peter Shukat had fraudulently altered or manipulated the June 8 agreements. As to that claim, he found that "[t]here is no evidence, as far as I am concerned, to show any impropriety or anything that [Shukat] did with respect to those documents that would constitute any kind of a fraud." At the close of their case, the defendants again moved for a directed verdict, and Judge Sweet reserved decision on this motion. At that time, he reiterated that he would "not submit to the jury any claim based on forgery, facsimile, obliteration of documents or alteration of documents because I don't believe that there is any evidence in this record sufficient for that purpose as against any of the defendants."

The jury rendered a verdict rejecting Calloway's claims. This verdict was hardly surprising in light of what Judge Sweet described as "the overall insubstantiality of Calloway's copyright action." 111 F.R.D. at 648. In addition to weaknesses described earlier, there was no evidence that the Marvel presentation was the cause of the failure to obtain financing for the film, the only source of compensatory damages. LeFlore retained an expert on damages only shortly before trial, but the expert's testimony "failed to provide any basis upon which actual damages could be calculated." *Id.* at 644. Indeed, the district court suggested that had the jury returned a verdict in Calloway's favor, no damages would have been allowed. *See id.* at 644-45 ("there never was any factual basis for any spe-

cific damages, nor any objective proof of causation"). Moreover, again to quote the district court, "there was little evidence regarding any intent of the defendants to misappropriate Calloway's copyright." *Id.* at 645. In particular, there was no evidence of a purported conspiracy among Marvel, Galton, Brodax and the Shukats to infringe Calloway's copyright. According to the district court, "[n]o circumstantial evidence was presented to indicate that either of the Shukats sought to engage in joint action with the other defendants. Indeed, the copyright claims against them were dismissed on this basis." *Id.* at 648.

After trial, the defendants sought sanctions from Calloway and LeFlore individually and from LeFlore's firm, Pavelic & LeFlore. Their motions were based on a claim that each of Calloway's allegations, including the facsimile claim, were at all times baseless. Their claim that they had paid in excess of $900,000 in attorney's fees to defend the litigation was undisputed.

Pavelic & LeFlore continued to represent Calloway in opposing the motions for sanctions, even though some aspects of the motions raised the issue of the relative responsibility of Calloway and LeFlore for conduct, if any, that violated Rule 11. The conflict of interest was of course most aggravated with regard to the facsimile claim, which Calloway had testified was based on his understanding of what a handwriting expert had told LeFlore. Neither Calloway nor LeFlore submitted an affidavit in opposition to the motions for sanctions, leaving all factual issues to be decided on the existing record. The brief submitted by Pavelic & LeFlore (signed by LeFlore) ignored the fact that sanctions were being sought for the facsimile claim, to which a single, oblique reference was made in a

footnote, as well as for other claims. LeFlore's oral argument also ignored the facsimile claim and focused largely on the proposition that sanctions should not be imposed simply because the jury found against Calloway. Of course, the facsimile claim never went to the jury, and this argument was of no relevance as to it.

Judge Sweet issued a lengthy decision on August 1, 1986, *see* 111 F.R.D. 637 (S.D.N.Y. 1986), in which he denied the Rule 11 motions for sanctions as to every aspect of the case but the facsimile claim.[5] As to that claim, he imposed $100,000 in Rule 11 sanctions against Calloway. After noting that Calloway gave testimony that was not consistent with previous statements under oath but that he "may have been unaware of the consequences of his statements," Judge Sweet concluded that "Calloway's inability to give consistent and forthright testimony resulted from his willingness to follow his attorney's advice rather than his own intent to misrepresent the facts." *Id.* at 649-50. Judge Sweet imposed a separate judgment of $100,000 in Rule 11 sanctions on Pavelic & LeFlore on the ground that the facsimile claim never had a reasonable basis. *Id.* at 651.

Judge Sweet also imposed $23,000 in sanctions against Pavelic & LeFlore pursuant to 28 U.S.C. § 1927 for failing to accept an offer of settlement from Quiros, *id.* at 649,

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5 In limiting sanctions to the facsimile claim, Judge Sweet rejected the defendants' argument that Calloway's entire action was frivolous. The defendants, for example, claimed that Calloway's copyright infringement claim was frivolous because of a lack of evidence that Calloway's copyrighted script was used in preparing the Marvel presentation, only that material from the Roth synopsis was used. Judge Sweet determined that this was a nonfrivolous issue of fact because copying from a prior draft of a copyrighted work could be copyright infringement. 111 F.R.D. at 645-46. He also ruled that Calloway's claims regarding the Shukats' misrepresentations and the meaning of the writer's agreement did not call for Rule 11 sanctions. *Id.* at 648.

652, and $10,000 in sanctions to be paid by Calloway under 17 U.S.C. § 505 of the Copyright Act, which provides that "the court in its discretion may allow the recovery of the full costs by or against the party . . . [including] a reasonable attorney's fee to the prevailing party as part of the costs." *Id.* at 652.

Two weeks later, the firm of Pavelic & LeFlore was dissolved. Radovan Pavelic then made a Fed. R. Civ. P. 60(b) motion to relieve the firm of the various sanctions. At that time, both Pavelic and LeFlore withdrew as counsel for Calloway because they had now discovered that a conflict of interest existed regarding the motions for sanctions. Judge Sweet granted the Rule 60(b) motion in part and allocated the $100,000 in Rule 11 sanctions equally between the firm and LeFlore, because the firm entered the litigation only in October 1984. *See* 650 F. Supp. 684, 688 (S.D.N.Y. 1986).

LeFlore sought a stay pending appeal of the judgment awarding sanctions. In support of his motion, he submitted an affidavit that, astonishingly enough, asserted that the facsimile claim had never been made. He thus stated,

> While the document tampering allegation developed over time as plaintiff and I were made aware of new evidence, the essence of our position on the authenticity of the agreements was, from beginning to end, not that Calloway's signature was imitated by another person (although Calloway himself sometimes could not identify certain signatures as his) but that the contracts had been altered, manipulated and forged (in the sense of altered) after being signed.

DISCUSSION

1. *The Sanctioned Conduct*

Because LeFlore takes the position that the facsimile claim was never made and that sanctions were imposed only for "document tampering," language that he implies refers only to the white-out claim, we must define with specificity the exact conduct that was the basis for imposing sanctions. In that regard, Judge Sweet stated:

> Calloway opposed the summary judgment motion in April, 1984 by claiming that he did not sign the Option Agreement and that it was improperly extended by an extension agreement prepared in September, 1981. . . .
>
> As to the first of these claims, it is now apparent that there was no basis in fact for Calloway's assertions and insufficient inquiry by his counsel. Calloway's statement that he did not sign the Option Agreement inserted into the actions the issues of forgery, manipulation and facsimile signature which created smokescreens during the subsequent two years of discovery. . . .
>
> [T]he basis for Calloway's forgery and facsimile claim should have been known at the time it was originally asserted. It is apparent now that Calloway himself had no basis to make that claim, since he admitted at trial that the evidence regarding this issue was developed by his attorney and not from his personal knowledge of his signature or his actions. Calloway further stated that he was unable to determine for sure whether his signatures were authentic. On the other hand, counsel for Calloway had not yet consulted any expert at the time of the summary judg-

> ment motion, and even when an expert was obtained, no material evidence of forgery or facsimile was discovered.
>
> Given the admitted absence of any affirmative evidence from either the signatory o[r] the documents that Calloway's signature was not genuine, it is inconceivable that this allegation could have been made in accordance with the obligations imposed by Rule 11. Instead it appears that in their ambition to maintain this action, Calloway and counsel allowed his inconclusive inability to recognize his signature to be translated into a conclusive denial of his signature. When the central basis for opposing summary judgment is proffered on such an insignificant foundation, Rule 11 sanctions are appropriate.

111 F.R.D. at 646-47 (footnote omitted). Moreover, Judge Sweet explicitly distinguished the white-out claim from the facsimile claim in a footnote:

> The other document manipulation claims asserted by Calloway were raised only after it became apparent that forgery or facsimile signature allegations could not be pressed any further. These evolving claims regarding white-outs, additions of another party's signature and alleged removal were so insignificant and immaterial that they were eventually dismissed by the court.

Id. at 647 n.2.

On appeal, LeFlore's counsel continues to play the hand dealt by LeFlore's affidavit supporting the motion for a stay and argues that Calloway never advanced the facsimile claim but asserted only that the text of the documents

was altered by white-out after he signed them. His brief on this appeal thus states:

> The District Court's opinion imposing sanctions proceeds as though Calloway's allegation at the time of the summary judgment motion and until shortly before trial had been that his signature had been imitated on the June 1981 Agreements, and that the evidence at trial provided no support for such an allegation. This is simply incorrect. Although Calloway often had trouble recognizing his signature and sometimes denied that certain signatures were his, the position being asserted in court was from beginning to end, as LeFlore has said, that the documents had been altered after Calloway signed them.

Brief for Appellant-Cross-Appellee Ray L. LeFlore at 30-31. Simply put, that statement is incorrect. That LeFlore repeatedly claimed that Calloway's signature had been "imitated" is irrefutably evidenced by the following:

(1) Paragraph 52 of the amended complaint, filed August 31, 1983, alleged that "[o]n or about August 5, 1981 without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, back-dated to June 8, 1981 . . . .";

(2) LeFlore's memorandum of October 19, 1983 in opposition to a motion to dismiss restated Paragraph 52 of the amended complaint;

(3) Calloway's affidavit in opposition to a motion for summary judgment, written by LeFlore, restated Paragraph 52 of the amended complaint, stated that the documents had been "forged," and further stated that

Calloway had "neither signed nor approved" the documents;

(4) LeFlore's memorandum of law in opposition to the motion for summary judgment stated that Calloway had "neither signed nor approved the agreements";

(5) LeFlore's reply memorandum in opposition to the Marvel defendants' motion for summary judgment stated that the documents "were forged" and "signed by others" and that "defendants' only recourse is to claim-over against those individuals who either forged plaintiff's signature or represented they were authorized to sign for him." These statements cannot be read as anything but challenges to the genuineness of Calloway's signatures.

(6) Calloway's answers to Peter Shukat's interrogatories restated Paragraph 52 of the amended complaint, stated that Peter Shukat had access to "facsimiles from the documents actually signed by plaintiff," and further stated that the original documents provided by defendants "evidence the affixation of a facsimile of plaintiff's signature thereto";

(7) Calloway's answers to Quiros's interrogatories repeated the "evidence the affixation of a facsimile of the plaintiff's signature" and stated that "[p]laintiff did not sign this document."

(8) LeFlore's belated retention of a handwriting expert to examine, *inter alia*, the signatures on the contract is inexplicable unless he was claiming forgery. Moreover, in July, 1985, counsel for Peter Shukat sent LeFlore a letter containing an opinion from another handwriting expert opining that Calloway had signed the agreements and urging that the facsimile claim be withdrawn. If LeFlore was not challenging the genuineness of Calloway's signatures,

a response denying that he was making such a claim was clearly called for. No response was made.

(9) Calloway stated in a deposition that the word facsimile meant that the signatures on the contracts "*imitate* my signatures" (emphasis added).

(10) Calloway's proposed pretrial order of March 25, 1986 restated the allegations of Paragraph 52 of the amended complaint that Peter Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents."

The foregoing amply demonstrates that the claim in LeFlore's brief that he never alleged that plaintiff's signature had been "imitated" is as baseless as was the facsimile claim itself.

2. *Rule 11 Sanctions and the Facsimile Claim*

Rule 11, as amended, requires that "[e]very pleading, motion or other paper of a party represented by an attorney shall be signed" by the attorney. It then provides that:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The 1983 amendment to Rule 11 was intended to "discourage dilatory or abusive tactics and help to streamline

the litigation process by lessening frivolous claims or defenses." Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment. *See generally* Schwarzer, *Sanctions Under the New Federal Rule 11—a Closer Look*, 104 F.R.D. 181 (1985); Symposium, *Amended Rule 11 of the Federal Rules of Civil Procedure*, 54 Ford. L. Rev. 20 (1985).

We first addressed the meaning of the revised rule in *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) ("*Eastway I*"), *cert. denied*, 108 S. Ct. 269 (1987), where we held that the new phrase "formed after a reasonable inquiry" imposed an objective test replacing former Rule 11's subjective standard, under which an attorney's "good faith" belief in the "viability" of a pleading or paper provided a "safe harbor" from sanctions. *Id.* at 253. Under the objective standard, district courts should impose sanctions whenever a pleading has been

> interposed for any improper purpose, *or where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Id. at 254. In framing this standard, we were concerned lest sanctions stifle creative legal argument and therefore stated that courts should avoid hindsight and resolve all doubts in favor of the signer. *Id.* At the same time, we added that Rule 11 is violated "where it is patently clear that a claim has absolutely no chance of success under the existing precedents. . . ." *Id.*

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 1373 (1987), established that Rule 11

applies to all papers filed in a lawsuit and that the signer's conduct should be judged at the time the paper is signed. We held also that Rule 11 does not impose a continuing obligation on the signer to correct or withdraw papers previously filed. *Id.* at 1274-75.[6] We further noted that Rule 11 sanctions may not be imposed where an attorney has an objectively reasonable basis to pursue a factual claim. *Id.* at 1277.

In considering sanctions regarding a factual claim, the initial focus of the district court should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial. Where such a basis was shown, no inquiry into the adequacy of the attorney's pre-filing investigation is necessary. If no reasonable evidentiary basis for a factual claim was disclosed in pretrial proceedings or at trial, the district court must then scrutinize the objective reasonableness of the attorney's pre-filing inquiry and the basis for the claim developed by that inquiry. If the inquiry was objectively reasonable under the circumstances and disclosed a reasonable factual basis for the claim, then sanctions are not appropriate. On the other hand, if the attorney either failed to make an objectively reasonable inquiry or pursued a claim for which no basis was disclosed by such an inquiry, then sanctions are appropriate.

We now turn to whether Judge Sweet properly imposed sanctions for the facsimile claim. We review that decision

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6 Other circuits have decided some of these issues differently. The Fifth Circuit has held that an attorney has a continuing obligation to update papers previously filed. *See Robinson v. Nat'l Cash Register Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987) (citing *Southern Leasing Partners v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986)), while the Seventh Circuit has ruled that Rule 11 analysis has a subjective component. *See Szabo Food Serv. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987).

de novo. *Eastway I*, 762 F.2d at 254 n.7 ("Where the only question on appeal becomes whether, in fact, a pleading was groundless, we are in as good a position to determine the answer and, thus, we need not defer to the lower court's opinion."). However, factual findings underlying the imposition of sanctions are reviewed under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a).

It is now beyond dispute that the facsimile claim was never supported by any evidence at any stage of the proceeding. Having determined that the facsimile claim on its face was never grounded in fact, we turn to the objective reasonableness of LeFlore's pre-filing inquiry. The Advisory Committee's Note states that

> what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading . . . ; or whether he depended on forwarding counsel or another member of the bar.

Fed. R. Civ. P. Rule 11 advisory committee's note to 1983 amendment.

An attorney is entitled to rely on his or her client's statements as to factual claims when those statements are objectively reasonable. In *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006 (2d Cir. 1986), we reversed the district court's award of sanctions, holding that the attorney's reliance on his client's statements—that the client's employer received federal grants for its work for the military, thereby subjecting the employee to the requirements of the Rehabilitation Act—was reasonable under the circumstances because "the relevant information was largely in the control of defendants." *Id.* at 1012. Moreover, in *Oliveri*, we ruled that an attorney made a

reasonable investigation prior to filing a civil rights suit for an allegedly unconstitutional arrest when he interviewed his client, and obtained and reviewed police and court records. 803 F.2d at 1276-78.

In both *Kamen* and *Oliveri*, the sanctioned attorney submitted an affidavit to the district court recounting the pre-filing inquiry. *See Kamen*, 791 F.2d at 1009; *Oliveri*, 803 F.2d at 1268-69. By contrast, LeFlore never submitted an affidavit to the district court describing a pre-filing inquiry. That fact alone strongly suggests that no inquiry was made.

Nevertheless, given the seriousness of this matter, we take note of the statement by LeFlore's appellate counsel at oral argument that the facsimile claim was based on LeFlore's "interpretation of what his client told him," namely that Calloway told LeFlore that he had not signed the agreements in his personal capacity but only on behalf of Netta.[7] Even if the statement at oral argument by

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7 At oral argument, the following colloquy occurred:

> NEWMAN, J.: What the complaint says is, on or about August 5, without plaintiff's knowledge, Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents." That's what it says.
>
> MR. PIEL: That's what it says. An awkward and inept way . . .
>
> NEWMAN, J.: [Can] we establish that's not so?
>
> MR. PIEL: That's what it says, your Honor.
>
> NEWMAN, J.: And is that not so?
>
> MR. PIEL: That is not so.
>
> NEWMAN, J.: It didn't happen.
>
> MR. PIEL: It did not happen.
>
> NEWMAN, J.: But, did the lawyer have any basis for thinking that that had happened, namely the improper affixing of a facsimile of plaintiff's signature to another document?

LeFlore's counsel is treated as a sworn statement by LeFlore, the statement is still no evidence that Calloway told LeFlore that he, Calloway, believed that Peter Shukat had affixed a facsimile of his signature to the relevant documents. Indeed, at trial, Calloway agreed that he never had "real evidence" for the facsimile claim other than *what LeFlore told him*, a reference to his deposition testimony that a handwriting expert had confirmed to LeFlore the improper affixation of a facsimile signature to the contracts. *See* note 4, *supra*. LeFlore has never disputed this version of events notwithstanding the fact that the expert he hired, contrary to Calloway's belief, did *not* support it.

At oral argument, LeFlore's counsel argued that the attorney-client privilege bars an attorney from raising the defense that he was misled by his client. We need not explore the precise role of the attorney-client privilege in Rule 11 proceedings, however, because Calloway has never sought to invoke it. If LeFlore believed that he had been misled by Calloway, he should have ceased representing him at the start of the Rule 11 proceedings and allowed Calloway to seek the aid of new counsel. Had LeFlore done so, Calloway could have decided whether or not to invoke the privilege, and the issue would have been properly posed. No such steps were taken here. Moreover, LeFlore's claim on this appeal is not that Calloway misled LeFlore but that LeFlore unaccountably created the facsimile claim out of Calloway's statement that he had signed the documents only as an officer of Netta and not

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Mr. Peel: That was his interpretation of what [LeFlore's] client told him. And I think that the lawyer is entitled to a presumption that his client told him the same thing that he later told the court and jury under oath, which is that the only agreements I signed were agreements that I signed on behalf of Netta Productions, Inc.

in his personal capacity. That statement is hardly an objectively reasonable basis for the facsimile claim.

The record demonstrates beyond argument LeFlore's indifference to whether the facsimile claim had a factual basis. When the original documents (textually identical to the exhibits to the original complaint) were produced by the defendants, they contained several minor changes involving the obvious use of white-out, which the district court quite properly deemed "insignificant and immaterial." 111 F.R.D. at 647 n.2.[8] It is conceivable that a reasonable lawyer viewing these documents for the first time would conclude that an inquiry should be made into the alterations. However, nothing on the face of these documents suggests the affixation of a facsimile signature or forgery.

LeFlore did not retain a handwriting or document expert until November 1984, more than one year after he signed the amended complaint and more than six months after writing the affidavit for Calloway stating that the signatures on the agreements were not genuine and filing other papers saying the contracts were "forged" and "signed by others." This expert, Pearl Tytell, compared the original set of documents with several checks bearing five of Calloway's genuine signatures. On the basis of this examination, she told LeFlore that all the agreements were "probably" signed by the same person and "possibly" by

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8 He further found that these changes were "within the customary practice in such an undertaking." *Id.* at 644. For example, the word "by" next to Calloway's name on the signature page of the writer's agreement was whited-out after he signed this agreement in order to permit the addition of Klein's signature. The word "Writer" was then moved down one line so as to be parallel with Calloway's signature. Similarly, the word "Writer" replaced "Netta" throughout the agreement. The district court found that "[t]he signing of certain documents by Calloway as an officer of Netta was virtually a clerical oversight of inconsequential importance." *Id.*

the signer of the checks. At trial, she testified that she *never* considered the signatures on the June 8 agreements to be facsimile signatures, nor did she know of any evidence that they were not genuine. Calloway's deposition was taken after Tytell had made an oral report to LeFlore. When Calloway stated in that deposition that he was relying upon an expert's opinion to support the facsimile claim, LeFlore knew that no such opinion existed and that the expert actually refuted the claim. Nevertheless, LeFlore declined to drop the claim.

Finally, we note that Calloway's testimony regarding the facsimile claim was inconsistent and sometimes unintelligible and that he may have been mentally ill. These facts hardly justify pursuit of the facsimile claim, however. A reasonable attorney would not pursue a claim of forgery based on such equivocal evidence from such an untrustworthy source. A sensitivity to an attorney's obligation not to press baseless claims would call for caution in such circumstances rather than the headlong and heedless pursuit of a claim of the most serious misconduct by another attorney.

LeFlore's indifference to the existence of a factual basis for the facsimile claim is not cured by Levites's April 1, 1986 letter to the district court abandoning that claim. Under *Oliveri*, the conduct of a signer of a pleading, motion or paper is judged as of the time that the signature is affixed, not later. 803 F.2d at 1274. An attorney cannot be sanctioned therefore for failing to withdraw a claim that later proves to be groundless, provided that the attorney: (i) conducted a reasonable pre-filing inquiry demonstrating a reasonable basis for the claim at the time it was made; (ii) did not subsequently restate the claim after learning that it was groundless; or (iii) did not decline to

withdraw it upon an express request by his or her adversary after learning that it was groundless. However, an attorney who does not undertake such an inquiry cannot avoid Rule 11 sanctions by later withdrawing a groundless claim. By that time, the damage has been done.

We also reject LeFlore's argument that the district court's denial of the Marvel defendants' motions under Rule 56 for summary judgment shield him from the imposition of sanctions. To the contrary, the denial of the motions is one basis for the sanctions. As Judge Sweet noted in imposing sanctions, plaintiff's "central basis for opposing" summary judgment was Calloway's affidavit stating that the documents had been forged by Peter Shukat's affixing a facsimile of Calloway's signature to them. 111 F.R.D. at 647. When he denied the motions for summary judgment on the basis of the facsimile claim as stated in Calloway's affidavit, Judge Sweet warned that sanctions would be imposed if the claim was baseless. *Id.* at 642.

It is hornbook law that a district court "cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried," and that "[g]iven this function, the district court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists rather than for the purpose of resolving that issue." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2712, at 574-75, 578 (1983). It is thus entirely possible that a baseless factual claim will survive a motion for summary judgment, particularly where an attorney prepares an affidavit for a client stating a material fact for which there is no basis. Where baseless allegations are used to prevent summary judgment, sanctions are manda-

tory if the attorney did not make a reasonable pre-filing inquiry when he or she originally put forward the claim. Rule 11's purposes would be ill-served by any other rule. *See* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 635 (1987) ("[B]ecause groundless factual allegations are difficult to uncover prior to trial, there is a danger that a lawyer seeking to extort a settlement might file pleadings based on a fabricated factual dispute. Rule 11 attempts to eliminate this danger by providing for sanctions against lawyers who press bad claims through gaps in other pretrial screening devices.") (footnotes omitted).[9] Accordingly, pursuit of

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9 LeFlore also claims that Rule 11 sanctions should not be imposed "when based on one allegation in support of claims that were supported by other independent allegations." For that proposition, LeFlore relies upon *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986). In that case, the district court had imposed sanctions on defense counsel who had made a concededly good faith argument for extension of the law, but had described that argument as if it were existing law. In reversing, the Ninth Circuit held that Rule 11 does not require counsel to engage in such "argument identification." *Id.* at 1539-40. The court further stated in dicta that:

> Moreover, Rule 11 does not apply to the mere making of a frivolous argument. The Rule permits the imposition of sanctions only when the 'pleading, motion, or other paper' itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous. Nothing in the language of the Rule or the Advisory Committee Notes supports the view that the Rule empowers the district court to impose sanctions on lawyers simply because a particular argument or ground for relief contained in a non-frivolous motion is found by the district court to be unjustified. In short, the fact that the court concludes that one argument or sub-argument in support of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding that the motion or pleading is frivolous or that the Rule has been violated.

Id. at 1540-41.

Golden Eagle, however, dealt with a legal rather than, as here, a factual claim. Moreover, the fascimile claim was no minor sub-claim in an otherwise well-and-independently grounded claim. *Cf. Oliveri*, 803 F.2d at 1280 (sanctions not warranted in civil rights case for "boilerplate" allegations that were not given "serious consideration" by

the facsimile claim justifies the imposition of Rule 11 sanctions.

3. *Rule 11 Sanctions Against Calloway*

Calloway appeared pro se on his appeal. He asked that we appoint counsel to represent him but failed to file an affidavit of indigency as requested. Because he thereafter filed no papers, his appeal was automatically dismissed by the clerk for failure to prosecute under our Civil Appeals Management Plan. For reasons stated immediately *infra*, we are *sua sponte* recalling the mandate and reinstating Calloway's appeal in order to remand for a determination of the relative responsibility of Calloway and his attorneys for the conduct violating Rule 11 and the allocation of sanctions between them.

The entire Rule 11 proceeding against Calloway was thoroughly tainted by Pavelic & LeFlore's representation of him notwithstanding a self-evident conflict of interest. The motions for sanctions explicitly relied, *inter alia*, upon the facsimile claim. With regard to that claim, Calloway had agreed at trial that he had no "real evidence" other than what LeFlore had told him, namely that a handwriting expert had supported the claim that facsimile signatures were improperly affixed to the contracts. This testimony alone clearly raised an issue as to whether Calloway or LeFlore, or both, were responsible for the conduct Judge Sweet found violative of Rule 11. Unless LeFlore was prepared to inform Judge Sweet that he had in fact

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defendants thereby rendering any technical violation of Rule 11 "*de minimis*"). The facsimile claim was in fact "the central basis for opposing summary judgment," 111 F.R.D. at 647, and was an "ill-advised attempt to bolster an otherwise weak case." *Id.* at 648. Moreover, a claim of forgery against a defendant attorney cannot be ignored but must be vigorously defended.

put words in Calloway's mouth in preparing the amended complaint, the affidavit opposing the motions for summary judgment and various answers to interrogatories, and that he thereafter misrepresented to Calloway Tytell's opinion on the matter, he should have ceased to represent Calloway in the Rule 11 proceedings. *See Eastway*, 637 F. Supp. 558, 570 (S.D.N.Y. 1986) (when there is question as to whether client or attorney is at fault, interests of two become adverse and client will need new counsel to represent him). Instead, his firm, from which the defendants were also seeking sanctions, continued to represent Calloway, submitting a brief (signed by LeFlore) devoted almost exclusively to issues that had been submitted to the jury, making only a single, oblique reference to the facsimile claim in a footnote. Of course, no argument was made to the court that LeFlore and the firm bore full responsibility for the facsimile claim. In particular, the extent to which LeFlore pressed the facsimile argument upon Calloway, including a misrepresentation as to an expert's opinion, was not explored. Nor was it argued that, even if Calloway bore some responsibility for the claim, LeFlore and the firm should be jointly and severally liable for sanctions imposed on Calloway.

The district court imposed $100,000, fifty percent of the total sanctions, upon Calloway, an amount for which the attorneys are not jointly and severally liable. In imposing sanctions, however, Judge Sweet stated that Calloway may not have been aware of the consequences of his statements and was prone to substitute his attorney's theories for the facts. He thus stated that Calloway did not knowingly lie in the affidavit that was written by LeFlore and that Calloway had not acted in bad faith. 111 F.R.D. 649-50. Moreover, the position taken by LeFlore at oral argument in this court is that LeFlore unaccountably

misinterpreted what Calloway told him regarding Calloway's signing only in his capacity as a corporate officer.

In imposing sanctions, Judge Sweet appears to have applied an "objectively reasonable" test to Calloway's conduct. That test, however, is appropriate only in evaluating the conduct of attorneys under Rule 11, not the conduct of parties represented by attorneys. As licensed professionals and officers of the court, attorneys are expected to measure up to minimal standards of professional competence under the Rule and thus may not excuse their conduct on the ground that they were acting in good faith. *Eastway I*, 762 F.2d at 253; *Eastway*, 637 F. Supp. at 566-67.

We believe that a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, *e.g.*, the paper made false statements or was filed for an improper purpose. The Advisory Committee stated that allocation of sanctions among attorneys and their clients was a matter of judicial "discretion" and that sanctions should be imposed on a party where appropriate under the circumstances. Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment. As guidance, the Committee cited *Browning Debenture Holders Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), a case holding that a represented party should not be held liable for wrongful conduct by attorneys unless the party was personally aware of or responsible for the conduct.

We believe that where a represented party either did not knowingly authorize or participate in the filing of a paper that violated Rule 11, sanctions against that party are not appropriate. We further believe that when a party has par-

ticipated in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such participation or signing was wrongful, then sanctions against the party are also not appropriate. In each of these cases, the attorney, because of professional standards, is held to know of the wrongfulness of the conduct and, because of professional responsibility, should act to prevent it. Where the attorney fails to advise an unwary client of the wrongfulness of such conduct, the burden of sanctions should fall entirely upon the attorney. *See Quiros v. Colon*, 800 F.2d 1 (1st Cir. 1986).

Of course, where the party does know that the filing and signing is wrongful and the attorney reasonably should know, then sanctions against both are appropriate. Where a party misleads an attorney as to facts or the purpose of a lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate. *See Friedgood v. Axelrod*, 593 F. Supp. 395 (S.D.N.Y. 1984) (plaintiff lied to attorney).

In the present case, Calloway's signing of the affidavit and answers to interrogatories were seriously wrongful. Judge Sweet, however, appears to have believed that Calloway's contacts with reality were so fragile that he may not have understood that swearing to the facsimile claim was culpable and may have been merely trying to accommodate LeFlore. Indeed, Judge Sweet stated that Calloway did not act in bad faith. 111 F.R.D. at 650. In such circumstances, the imposition of sanctions upon Calloway would be error. Had Calloway pursued his appeal, therefore, it is clear that the judgment against him would at the very least have been remanded. The only question, there-

fore, is whether Calloway's appeal should be reinstated and the mandate recalled. We believe it should.

Were Calloway now to file a motion to reinstate the appeal, we would certainly grant it. *Cf. Avlon v. Greencha Holding Corp.*, 232 F.2d 129 (2d Cir. 1956) (after misunderstanding as to which of several attorneys would handle appeal, motion for leave to file brief granted more than three years after records had been filed). Fed. R. App. P. 2 clearly authorizes us to relieve litigants of the consequences of default "where manifest injustice would otherwise result." Fed. R. Civ. P. 2 advisory committee's notes. The potential of such an injustice clearly exists in the present case, and we believe that the appeal should be reinstated and the judgment against Calloway remanded.

The issue here is not simply the plight of a pro se appellant with a viable claim of error who abandons his or her appeal. The Rule 11 proceeding concerning Calloway was thoroughly tainted by his attorneys' failure to withdraw from representation at the start of the proceeding in which they had an adverse financial interest. *See generally* Code of Professional Responsibility Canon 5, N.Y. Jud. Law Appendix (McKinney 1975). The result was financially disastrous to Calloway and, because Calloway was found to be fifty percent responsible for the conduct violating Rule 11, benefited the attorneys. Because he was represented by attorneys with a clear conflict of interest, Calloway is not only likely to be unaware that he had a viable ground for appeal concerning his responsibility relative to that of LeFlore, but he may also believe that he is protected by LeFlore's appeal. Indeed, LeFlore's brief asks us to reverse the judgment against Calloway on the overstated grounds that the issues regarding the imposition of

sanctions on him are identical to those raised by LeFlore. LeFlore's brief thus states:

> Calloway filed with this Court on September 16, 1986 a motion for appointment of counsel and for a stay of proceedings. That motion was denied on May 29, 1987 without prejudice to Calloway submitting an affidavit regarding his inability to retain counsel. Even if Calloway does not submit a brief, a decision by this Court in favor of LeFlore and Pavelic & LeFlore reversing the imposition of sanctions under Rule 11 should apply as well to the $100,000 Rule 11 sanction which was imposed against Calloway on the same grounds.

Brief for Appellant-Cross-Appellee Ray L. LeFlore at 7 n.1. Calloway and LeFlore may share a common position as to the meritless argument that the facsimile claim was never made and therefore that no sanctions should have been imposed. Otherwise, however, the sanctions imposed on Calloway are based on a finding that he was jointly responsible with his attorneys for pursuit of the facsimile claim, a finding not disputed by LeFlore's appellate brief. Moreover, if LeFlore's counsel believes that LeFlore's appeal protects Calloway, Calloway, being unaware of the conflict of interest, may also believe that LeFlore's appeal is a substitute for his own. The danger of a manifest injustice therefore exists, and we recall the mandate and reinstate Calloway's appeal.[10] On that appeal we vacate the $100,000 sanctions under Rule 11 and remand for a rede-

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10 We do not reinstate Calloway's appeal regarding the award of attorney's fees under 17 U.S.C. § 505. The conflict of interest did not affect this award since the statute specifically authorizes such an award only against a party, and Calloway's good faith would not be a defense to such sanctions. *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984).

termination of Calloway's responsibility for the facsimile claim under Rule 11 and for other proceedings consistent with this opinion.

4. *Amount of Rule 11 Sanctions and Joint and Several Liability*

To reiterate, the district court imposed Rule 11 sanctions totalling $50,000 against LeFlore, and $50,000 against Pavelic & LeFlore. 650 F. Supp. at 688. The district court also imposed separate sanctions of $100,000 under Rule 11 against Calloway. LeFlore and the firm claim that Judge Sweet abused his discretion in awarding sanctions of this magnitude, while cross-appellants Marvel, Galton and Brodax seek an increase in their award.

As we noted in *Eastway I*, district courts have "broad discretion in fashioning sanctions," 762 F.2d at 254 n.7, and we review such an award under the "abuse of discretion" standard. *Id.* In *Eastway I*, we remanded to the district court the task of imposing "appropriate sanctions," a sum to include "the amount of reasonable expenses incurred by" the defendants. *Id.* at 254. After Judge Weinstein awarded only $1,000 in sanctions, *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986), we modified the award to "the bottom of the range of discretion appropriate to this case" or $10,000. *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir.) ("*Eastway II*"), *cert. denied*, 108 S. Ct. 269 (1987). In *Eastway II*, we counseled that district courts should "carefully calibrate" the award of sanctions, and "award only that portion of a defendant's attorney's fee thought reasonable to serve the sanctioning purpose of the Rule." *Id.* at 122-23.

In imposing Rule 11 sanctions in the instant case, Judge Sweet considered "the gravity of the Rule 11 violation, the circumstances of the violation within the context of the case, and the financial resources of the respective parties." 111 F.R.D. at 651. He then stated that he

> regard[ed] the violation in this case to be a very serious breach of the obligations of an attorney to conduct a reasonable inquiry into the factual circumstances underlying a pleading or a motion, for this case could have been resolved at a much earlier stage if the baseless assertions of forgery and document manipulation had not been made.

Id. After noting that an award of $900,000, the defendants' aggregate attorney's fees, would be "extremely onerous," Judge Sweet determined that a sanction of $200,000 to be borne equally by Calloway and Pavelic & LeFlore was appropriate. *Id.* This amount represented approximately the average fee of the five defense counsel. *Id.*

Putting aside for the moment the question of allocating the sanctions among Calloway and his attorneys, we conclude that the total of $200,000 is not excessive. As we said in *Eastway II*, "[t]he concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand; . . ." 821 F.2d at 123. We entirely agree with Judge Sweet that pursuit of the facsimile claim, which amounted to an utterly baseless charge of forgery against a lawyer, was "a very serious breach" of Rule 11, 111 F.R.D. at 651, and a substantial sanction was appropriate. We cannot say therefore that Judge Sweet abused his discretion in awarding $200,000, an amount approximating twenty percent of the defendants' attorney's fees of $900,000. In *Eastway II*,

a reasonable attorney's fee under the lodestar method was $52,912.50, and we held that "the bottom of the range of discretion" for sanctions was $10,000. *Id.* at 122-23.

The propriety of the portion of the Rule 11 sanctions imposed on the attorneys, $100,000, is thus clear. Less clear, however, is the liability of the attorneys for the $100,000 imposed solely upon Calloway, and we now remand for consideration of that issue. If on remand Judge Sweet decides not to reimpose some or all of the $100,000 sanctions on Calloway, a question then arises under the cross-appeal as to whether the attorneys should be made liable for the amount from which Calloway is then relieved in light of the fact that a finding of diminished responsibility on Calloway's part appears to imply increased responsibility on the attorneys' part. Even if on remand Calloway remains liable for some or all of the sanctions, we believe a question exists as to the appropriateness of joint and several liability of the attorneys for that amount.

We believe these interrelated questions should be addressed as follows. We now affirm the $100,000 in sanctions imposed on the attorneys. On the remand that we have ordered in Calloway's reinstated appeal, Judge Sweet, applying the legal standards described above, should determine what portion, if any, of the $200,000 total sanctions is the responsibility of Calloway and impose either no sanctions on him or an appropriate amount between zero and the $100,000 originally imposed. If he revises the sanction against Calloway from the $100,000 originally imposed, he should then consider whether the attorneys should be liable for that portion of the $100,000 no longer outstanding as to Calloway. We believe this is an issue fairly raised by the Marvel defen-

dants' cross-appeal that seeks, *inter alia*, an increase in the sanctions imposed on the attorneys. The issue must be remanded, however. Judge Sweet's balancing of the numerous pertinent factors has now been undone by our remand of Calloway's appeal, and Judge Sweet should determine in the first instance the appropriate total mix of sanctions (in addition to the $100,000 affirmed) in the proceedings on remand.

We also remand the issue of the attorneys' joint and several liability for amounts owed by Calloway, if any, after remand. We do so because Judge Sweet gave no reason for entering entirely separate judgments and may have believed that such judgments were required by the district court's decision in *Eastway*. The district court stated there that clients may not reimburse lawyers for Rule 11 sanctions because the possibility of such reimbursement might eliminate the deterrent effect of Rule 11 on attorneys. 637 F. Supp. at 570. Here, however, we face a different situation, for the question whether Calloway may pay the judgment against LeFlore and the firm is not before us. Whether LeFlore and the firm should be jointly and severally liable for sanctions imposed on Calloway, in addition to the separate judgment against them, however, does fairly arise from Calloway's appeal. We believe district courts have discretion to make attorneys jointly and severally liable for sanctions against their clients where the attorneys should have known the conduct at issue violated Rule 11.

In the case of represented clients, the attorney has the principal responsibility for complying with Rule 11 and, where not misled by the client, may properly be jointly and severally liable for the judgment against the client. So long as the attorney was not misled by the client, the attorney's

conduct is a proximate cause of the Rule 11 violation. How sanctions are to be structured, however, is largely a matter of the district court's discretion. We merely stress that it has power to impose joint and several liability on that portion of sanctions resulting from a party's misconduct where the attorney should have known that the misconduct violated Rule 11. We do not reach the question whether a client may be jointly and severally liable for that portion of sanctions resulting from the lawyer's misconduct.

To some extent, the financial resources of the attorneys may be relevant to the remanded questions, and Pavelic and LeFlore should be allowed to supplement the record on that issue notwithstanding their failure to offer such evidence originally. Calloway should also be allowed to make a factual submission in addition to the present record regarding his responsibility for the facsimile claim if he chooses. The attorneys may of course answer that submission.

5. *Rule 11 Sanctions Against Pavelic & LeFlore*

Having determined that Rule 11 sanctions were properly imposed for pursuit of the facsimile claim, we now consider whether such sanctions can properly be imposed only against LeFlore, the signer of the papers in question, or against his law firm, Pavelic & LeFlore, as well. To reiterate, Judge Sweet originally imposed $100,000 in Rule 11 sanctions against Pavelic & LeFlore. 111 F.R.D. at 651-52. After a Fed. R. Civ. P. 60(b) motion by LeFlore's partner, Radovan Pavelic, Judge Sweet reallocated the $100,000 in sanctions, imposing sanctions of $50,000 on LeFlore individually, and $50,000 on Pavelic & LeFlore. 650 F. Supp. at 688. Judge Sweet made this reallocation because Pavelic

& LeFlore was formed only in October 1984, the approximate midpoint in the Calloway-Marvel litigation. *Id.*

The text of Rule 11 is silent on whether Rule 11 sanctions may be imposed only against the attorney signing the offending paper or may also be imposed on his or her law firm. It states that every paper shall be signed "by at least one attorney of record in the attorney's individual name"; that "[t]he signature of an attorney . . . constitutes a certificate by the signer that the signer has read the . . . paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry" the paper is "well grounded in fact and is warranted by existing law" or is "a good faith argument" to extend the law. Rule 11 then provides that if a paper "is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ."

In what appears to be the only appellate decision on this question, the Fifth Circuit has held "that an attorney must actually sign a 'pleading, motion, [or] other paper' in order to have sanctions imposed against him." *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128 (5th Cir. 1987). The district court in *Robinson* had imposed $4,246.25 in Rule 11 sanctions against the signer of the pleading and papers at issue and against his partner in a two-person law firm. *Id.* at 1121, 1125. The signer's partner had not signed any papers in the case, his only role having been attendance at a pretrial conference. The Fifth Circuit reversed, deeming it irrelevant that the nonsigning partner was a name partner in the law firm and that the firm's name appeared on the papers filed in the suit because "it is the attorney who signs the document, not the firm to which the attorney belongs, that certifies that

the document conforms to the requirements of the rule and accepts the responsibility if it does not." *Id.* at 1132. The decision was based on a perceived need to avoid "satellite litigation over exactly who [in a firm] was responsible for a particular document." *Id.* at 1129. The court apparently assumed that "an inquiry would have to be made of the relative culpability of attorneys who did not sign but who were nevertheless involved with a particular document." *Id.*

Several lower courts, however, have imposed sanctions on law firms on whose behalf an offending paper was signed. *See, e.g., Anschutz Petroleum Marketing Corp. v. E.W. Saybolt & Co.*, 112 F.R.D. 355 (S.D.N.Y. 1986); *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 542 (S.D.N.Y. 1985); *Golden Eagle Distibuting Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986). In *Golden Eagle*, for example, Judge Schwarzer sanctioned the national firm of Kirkland & Ellis for filing a legal memorandum, signed by local counsel but prepared by a Kirkland & Ellis associate, that overstated a legal argument. *Id.* at 125 n.1.

We believe that Rule 11 sanctions should generally be imposed on a signer's law firm as well as on the individual signing an offending paper, although a district court may limit the sanctions to the individual signer where exceptional circumstances exist. Nothing in the language of the Rule prohibits this construction. Although Rule 11 provides for sanctions against the "person who signed" the offending paper, sanctions need not be restricted to individuals because a law firm may be as much the endorser of a paper as the individual attorney who signs it. A law firm is thus typically listed as counsel of record, and papers are

generally signed by an attorney on the firm's behalf. In the instant case, for example, the offending papers (after October 1984) were signed:

PAVELIC & LEFLORE
By: *Ray L. LeFlore (s)*
(A Member of the Firm)
Attorneys for Plaintiff

Moreover, law firms hold themselves out to clients, to courts and to other counsel as more than mere aggregations of individual practitioners sharing a phone. They create good will through a firm name and use this good will to attract clients, to achieve credibility with judges, and to ease relationships with other counsel. In many cases, clients may hire a particular attorney because of the attorney's affiliation with a certain law firm or a court may designate a lawyer as class counsel based on his or her firm's experience and reputation. Usually, moreover, partners share in the profits of all the work of the firm and also share in the costs.

Where firms are involved, the offending paper may be the joint product of background preparation and drafting by several attorneys. The individual attorney who signs a paper also may not be the one principally responsible for it. In many cases, even in a small firm, more than one lawyer may be involved in preparing a paper or in compiling the legal or factual material contained in it, and the signer of the paper may well be a junior attorney who is simply carrying out the instructions of a senior attorney. While of course we recognize that all attorneys, including the most junior,[11] must comply with Rule 11 when they sign an

11 Lack of training or experience is not an issue in this case. LeFlore informed the district court that he had been a member of the law review in law school and had practiced with Sullivan & Cromwell for nine years.

offending paper, limiting sanctions to the signer might encourage the sharp practice of having the most junior (or most impecunious) attorney sign a potentially offending paper.

Certainly, if a partner in a firm instructs an associate to sign a paper, basic agency principles suggest that the firm as principal should bear responsibility. *See* W. Sell, *Sell on Agency* 81-84 (1975). Under general partnership law, moreover, the partnership as a whole is responsible for the acts of a partner. The New York Partnership Law, while not controlling the interpretation of Rule 11, is nevertheless of guidance. It states that:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

N.Y. Partnership Law § 24 (McKinney 1948). Nothing persuades us that Rule 11 dispensed with this elementary principle of partnership law. Indeed, the Seventh Circuit has even affirmed the imposition of $400 in Rule 11 sanctions against the State's Attorney of Cook County under the doctrine of respondeat superior for an infraction by an assistant state's attorney. *Frazier v. Cast*, 771 F.2d 259, 260 (7th Cir. 1985).

The purposes of the 1983 amendment to Rule 11 will also be best served by holding law firms responsible for the acts of their attorneys. That amendment, as noted, was intended to increase deterrence of abusive and dilatory practices. *See* Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment. The Advisory Committee specif-

ically sought to increase the willingness of courts to impose sanctions and to "build[ ] upon and expand[ ]" the existing equitable doctrines for awarding sanctions. *Id.* Firm responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims.

We believe, therefore, that sanctions ought to be imposed on a signer's firm as well as on the signer unless there are exceptional reasons not to do so. Contrary to the belief of the *Robinson* court, this interpretation will not greatly increase the amount of satellite litigation over the imposition of sanctions, because in most cases there will simply be no reason not to include the firm.[12]

Turning to the instant case, Pavelic & LeFlore was a true partnership in the sense that profits and expenses were shared equally by the two partners. Although LeFlore may have done most of the work, the present litigation was handled by the firm as a whole. The firm advanced more than $60,000 in out-of-pocket expenses in connection with the Calloway litigation. The record shows that other attorneys of counsel *to the firm* participated in this litigation. One attorney took a portion of Calloway's deposition and another participated in the trial. Moreover, Pavelic himself was no passive observer in the Calloway litigation. He has admitted that he "often discussed" the case with LeFlore, that he attended several depositions and days of trial, and that he insisted that Raymond L. Levites be retained as special counsel for the trial. The firm's role was thus typical rather than exceptional.

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12 We do not reach the question of whether sanctions may be imposed on a law firm that prepares an offending paper but has another firm sign it. *See Golden Eagle Distributing Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984).

Pavelic & LeFlore claim, however, that several facts specific to this case militate against imposing sanctions on the firm. These special circumstances include: (i) Pavelic & LeFlore was not in existence when the facsimile claim was first put forward in the amended complaint; (ii) LeFlore never substituted Pavelic & LeFlore for a prior firm, LeFlore & Eagan, as Calloway's counsel of record; (iii) only the pretrial order was arguably the responsibility of the firm; and (iv) the firm should "get the credit" for abandoning the facsimile claim in its amendment to the pretrial order.

For purposes of imposing sanctions, the district court accepted Pavelic's claim that the firm was "not formally formed" until October 1984, 650 F. Supp. at 686 n.1, and then properly recognized that it could not "be held responsible for papers signed before the firm came into existence." *Id.* at 687. Nevertheless, the firm should be sanctioned for papers signed after formation of the firm that restated the facsimile claim, including answers to interrogatories and the pretrial order. The fact that these simply restated a claim developed prior to the firm's existence does not relieve the firm of its responsibilities under Rule 11, because every offending paper is a basis for sanctions. Moreover, the fact that the firm abandoned the facsimile claim (by not mentioning it) in an amendment to the pretrial order does not cure an earlier violation of Rule 11 because the propriety of a pleading is evaluated as of the time it was signed. *See Oliveri*, 803 F.2d at 1274. We also agree with Judge Sweet that LeFlore's failure to substitute Pavelic & LeFlore as Calloway's attorney of record pursuant to Local Rule 3(c) of the Southern District, *see* Rules of U.S. Dist. Cts. for the S. and E. Dists. of N.Y., Gen. Rule 3(c), does not prevent the award of sanctions against the firm, 650 F. Supp. at 687 n.2. This is so because it is

undisputed that the firm of Pavelic & LeFlore represented Calloway after October 1984. Exceptional circumstances justifying relief of sanctions on Pavelic & LeFlore are thus notably absent.

We face a more difficult issue in considering the district court's allocation of sanctions between LeFlore and his former law firm. The district court used a chronological yardstick in making this allocation because "[l]ooking back on the four years which this action consumed, it is impossible to allocate to individual pleadings, motions or other papers the reasonable expenses incurred by the defendants in defending against the frivolous allegations." 650 F. Supp. at 688. While a chronological yardstick is not an ideal proxy for making such an allocation, it appears to be as accurate as any other measure available in the circumstances of this case. Although assertion of the facsimile claim to defeat the motion for summary judgment preceded formation of the firm, the interrogatory answers and proposed pretrial order came afterward. Those answers and proposed order, moreover, were filed after Tytell had been retained and had failed to support the facsimile claim.

Finally, we note that on remand the amount of sanctions for which the firm is liable may be increased as a result of our ruling regarding the sanctions imposed on Calloway. There is no injustice in this. The firm continued to represent Calloway in the Rule 11 proceedings in which it had a conflict of interest and profited from doing so. Since the total mix of sanctions is to be reviewed on remand, however, we affirm only the $50,000 imposed on the firm and, as stated earlier, allow Judge Sweet to determine on remand what additional sanctions, if any, shall be imposed on the firm.

6. *Sanctions Imposed Against Pavelic & LeFlore Under 28 U.S.C. § 1927*

Judge Sweet also imposed $23,000 in sanctions pursuant to 28 U.S.C. § 1927 (1982) against Pavelic & LeFlore for its delay in accepting a settlement offer from defendant Luis Quiros. 111 F.R.D. at 649, 651. Judge Sweet found that this offer of settlement "provided Calloway with all the relief he could possibly expect to recover from Quiros," *id.* at 649, and that Pavelic & LeFlore had acted in bad faith in delaying acceptance of the offer. 650 F. Supp. at 688.

We briefly set forth the facts relating to the Quiros settlement. Beginning in October 1983, Quiros, who was one of Calloway's partners in LMN, had been represented *pro bono* by the firm of Brown & Wood in the present litigation pursuant to a request by the Southern District Civil Litigation Panel. Because Quiros had obtained a discharge in bankruptcy, the district court granted Quiros's motion to dismiss Calloway's monetary claims. However, it denied a motion to dismiss Calloway's request for injunctive relief against Quiros. Brown & Wood subsequently offered to settle Calloway's outstanding equitable claim by proposing that Quiros would: (i) forbear from any future unauthorized use of Calloway's works, name and business reputation; (ii) subject himself to a civil contempt citation for a breach of the agreement; and (iii) remain available for trial without the need for a subpoena.

LeFlore brusquely rejected this settlement offer in a one-sentence letter from Ilyse J. Wolfe of Pavelic & LeFlore written at LeFlore's request. The letter provided no reasons for the rejection. Brown & Wood then wrote a letter to the district court describing the offer and its unexplained rejection. LeFlore responded in a letter to the

court that the offer "did not afford Calloway the relief he seeks in the action" because the offer did not admit Quiros's liability to Calloway. At a March 17, 1986 pretrial conference, LeFlore again rebuffed the offer and reiterated his demand for an admission of liability from Quiros. LeFlore noted irrelevantly that any Fed. R. Civ. P. 68 offer of judgment must include costs and statutory attorney's fees. In response to a request from LeFlore, counsel for Quiros made another written offer of settlement. Without responding, LeFlore moved to strike Quiros's offer of settlement on the ground that it did not comply with the procedural requirements of Rule 68. Because the offer did not purport to be made under that Rule, the district court denied the motion. Throughout this period, counsel for Quiros continued, at considerable expense, to prepare for the upcoming trial.

On April 2, 1986, Quiros moved for sanctions against Calloway, LeFlore and Raymond L. Levites pursuant to Section 1927 and Rule 11, alleging that their conduct regarding the settlement negotiations was unreasonable, vexatious, improperly motivated and intended to harass. LeFlore argued in response that sanctions were not proper because Quiros's offers would not provide Calloway with a judgment entered by the court and enforceable as such, and costs and fees.

On April 8, two days into the trial, Judge Sweet told LeFlore "[y]ou do whatever you want," but that "Calloway should consider" that the "possibility" of sanctions existed. The next day, LeFlore entered into a stipulation pursuant to Fed. R. Civ. P. 41(a) which resulted in a dismissal of the action as against Quiros "with prejudice and without costs to each party as against the other." The stipulation also provided that:

> without admitting or denying liability, Mr. Quiros hereby agrees to forbear from all future unauthorized use of Mr. Calloway's works and name; breach of said agreement by Mr. Quiros shall be enforceable by a citation for civil contempt upon Mr. Calloway's application to the Court; Mr. Quiros shall promptly return to Mr. Calloway all property relating to the project "Skyrider" still in his custody; subsequent to execution of this Stipulation, Mr. Quiros's deposition testimony given in this action shall, if offered, be received in [as] if he were still a party. . . .

Judge Sweet signed the stipulation. The district court's docket indicates that the stipulation of dismissal was filed on April 10, 1986. Judge Sweet informed the jury that Quiros was "no longer a party to this proceeding" on that date. LeFlore and counsel for Quiros also agreed for the record that "of course all of Mr. Quiros'[s] claims whatever they may be will be dismissed as to counterclaims."

Four months later, on August 1, 1986, the district court granted Quiros's pre-settlement motion for Section 1927 sanctions, awarding $23,000 against Pavelic & LeFlore because LeFlore "flatly refused [Quiros's settlement] offer without explanation and continued litigation against Quiros until finally accepting the same offer after trial had commenced." 111 F.R.D. at 649.

District courts may not use the threat of sanctions to bring about a particular settlement of a case. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985). However, in *Kline v. Wolf*, 702 F.2d 400, 405 (2d Cir. 1983), we indicated in dicta that Section 1927 sanctions might be appropriate against an attorney for needlessly and vexatiously multiplying proceedings by rejecting a settlement offer that would afford complete relief.

In this case, we need not reach the merits of the Section 1927 sanctions because we believe that the pending motion for sanctions was extinguished when the case against Quiros was dismissed pursuant to the settlement. The day before the settlement, the district court had warned LeFlore that sanctions pursuant to the pending motion were a "possibility" if the case was not settled. It was in this context that the parties expressly agreed that "this action is dismissed, pursuant to Fed. R. Civ. P. 41(a), as against Mr. Quiros with prejudice and without costs to each party as against the other."

We faced a somewhat analogous problem in *Brown v. General Motors Corporation, Chevrolet Division*, 722 F.2d 1009 (2d Cir. 1983). In that case, the parties agreed to dismissal of plaintiff's civil rights suit "with prejudice and without costs to any party as against the other." *Id.* at 1010. We held that this release executed as part of the settlement barred a subsequent claim for attorney's fees under 28 U.S.C. § 1988 (1982). *Id.* at 1011-12. We interpreted the term "costs" as used in the settlement to include attorney's fees, *id.* at 1012 (citing *Fulps v. City of Springfield*, 715 F.2d 1088 (6th Cir. 1983)), and, alternatively, held that the attorney did not have standing to seek attorney's fees in his own name under Section 1983. *Id.* at 1011.

In the instant case, we believe the parties intended the April 9 stipulation to be a settlement of all of their disputes, including the pending claim for sanctions under Section 1927. Certainly, Pavelic & LeFlore had every reason to expect that the pending motion for sanctions would be extinguished when Quiros was dismissed from the case, particularly since the settlement was evidently a response to Judge Sweet's warning that settlement should be "con-

sider[ed]" in light of the "possibility" of sanctions. Accordingly, we reverse the award of $23,000 in sanctions against Pavelic & LeFlore under Section 1927. We note, however, that we appreciate the efforts of Brown & Wood as pro bono counsel in this matter.

CONCLUSION

For the foregoing reasons, we affirm the district court's imposition of Rule 11 sanctions against LeFlore and Pavelic & LeFlore. Calloway's appeal from the imposition of Rule 11 sanctions is reinstated *sua sponte*, the $100,000 sanctions against him are vacated, and the case is remanded for proceedings consistent with this opinion. On the cross-appeal, we remand for further proceedings consistent with this opinion to consider LeFlore's and Pavelic & LeFlore's liability for further sanctions, in the event that sanctions of less than $100,000 are imposed against Calloway. We reverse the award of sanctions imposed under Section 1927. This panel will hear any further appeal in this matter. Appellants LeFlore and Pavelic & LeFlore will bear all costs, to be shared equally between them, except for the appeal from the imposition of sanctions under Section 1927. No costs will be taxed on that appeal.

APPENDIX B

Northern J. CALLOWAY, individually and on Behalf of LMN Productions, Inc., Plaintiff,

v.

The MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORPORATION, James Galton, Al Brodax, Michael S. Klein, Luis Quiros, the Shukat Company, Ltd., Scott Shukat, Peter S. Shukat, Esq., Defendants.

The MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORPORATION, James Galton, Al Brodax, Michael S. Klein, Luis Quiros, and LMN Productions, Inc., Third Party-Plaintiffs,

v.

The SHUKAT COMPANY, LTD., Scott Shukat, Peter S. Shukat, Esq., Third-Party Defendants.

No. 82 Civ. 8697 (RWS).

United States District Court, S.D. New York.

Aug. 1, 1986

Pavelic & LeFlore, New York City, for plaintiff; Ray LeFlore, of counsel.

Sheber, Pomerantz & Slotnick, New York City, for third-party defendants Scott Shukat and Shukat Co., Ltd.; Sol v. Slotnik, of counsel.

Brown, Wood, Ivey, Mitchell & Petty, New York City, for defendant Luis Quiros; Stuart J.M. Breslow, of counsel.

Fred E. Scharpf, New York City, for defendants the Marvel Entertainment Group and James Galton.

Arnoff & Merin, P.C., New York City, for third-party defendant Peter Shukat; Norman Arnoff, of counsel.

Brookman & Brookman, P.C., New York City, for defendants Michael Klein and LMN Productions, Inc.; Michael D. Brookman, of counsel.

Santora & McKay, New York City, for defendant Al Brodax; Robert McKay, of counsel.

SWEET, District Judge.

Following a six-week jury trial which a verdict was returned in their favor on each claim brought by the plaintiff Northern J. Calloway ("Calloway"), the defendants Marvel Entertainment Group ("Marvel"), James Galton ("Galton"), Al Brodax ("Brodax"), Michael Klein ("Klein"), The Shukat Company ("SCL"), Scott Shukat and Peter Shukat have brought motions pursuant to Fed.R.Civ.P. 11, 17 U.S.C. §505, 28 U.S.C. § 1927 and the inherent powers of the court to award them costs, expenses and attorney's fees incurred during the defense of this action. Luis Quiros, with whom Calloway settled early in the trial, joins in the

motions of the other defendants and seeks independent relief under Rule 4 and 28 U.S.C. § 1927. The parties have also brought cross-motions regarding the taxation of costs. For the reasons set forth below, the motions will be granted in part and denied in part.

This litigation presented the all-too-familiar bathos from a world of fantasy to that of reality involving a once-in-a-lifetime science fiction movie musical for all ages ("The Skyrider"), the failure of trust among a partnership of short and uncertain standing (LMN Productions) and the difficulties of obtaining financial support for an untried writer and producer (Calloway). As if that were not enough, Calloway, the plaintiff and protagonist, achieved enough fame and success as an actor to lead him to conclude erroneously

that he did not have to stick to his last but could achieve success as a screenwriter and producer.

Further he was afflicted by a diagnosed psychiatric disorder which demonstrably affected his judgment.

These factors placed a heavy burden on Calloway's counsel which he failed to discharge adequately. Most regrettably, these factors became apparent only during and after a trial which was unduly prolonged by the assumption that there was more present than met the eye. The effort to offer Calloway every opportunity to proe his case, as argued by his counsel, was in hindsight mistaken and not in the best interest of any of the parties, as is more fully set forth below.

The Interrelationship of the Parties

Calloway is an actor who has performed in various theatrical and television productions, the most notable being his role as David in the ongoing "Sesame Street" television show. In 1979, when he became interested in creating a science fiction movie, Calloway convinced a gift shop salesman whom he met in that capacity and who had previously sought to write movie scripts to write a synopsis for "The Skyrider." Calloway used this synopsis to write his own script which was copyrighted and then registered in 1982. During this intervening period he had met Klein, a dentist and Luis Quiros, an insurance salesman, in an equally serendipidous fashion, and the three partners sought to promote "The Skyrider" project.

Unknown to the partners, Calloway had a history of mental illness at least since 1980. In September of that year, he severely beat a woman and damaged property while in Tennessee, an incident which resulted in civil litigation and criminal prosecution. Calloway received psychiatric treatment both from a state mental hospital and through a private physician and in 1982 entered a plea of temporary insanity in connection with the Tennessee incident. Prior to the institution of this action, he had been diagnosed as a bipolar manic depressive and received psychotherapeutic and drug treatment for his illness.

Klein and Luis Quiros became shareholders along with Calloway in LMN Productions, Inc., a corporation formed in June 1981 in order to finance the

production of "The Skyrider" as a motion picture.[1] None had any prior experience in such an undertaking nor any prior business relationship with each other. Klein, however, was able to make contact with defendant Marvel, and its executive officer James Galton, who became interested in "The Skyrider." Marvel participated through its employee Brodax in creating a presentation booklet entitled "The Skyrider" to assist in seeking production money. Defendant Scott Shukat was the principal for SCL

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1. In August, 1983, Quiros filed a bankruptcy petition pursuant to Chapter 13 and eventually obtained a discharge of all debts including Calloway's copyright claim. See Opinion of February 26, 1986.

which served under contract as Calloway's personal manager and agent during the relevant time period, having performed in that capacity for over seven years. Defendant Peter Shukat was Scott's brother and Calloway's regular attorney, as he had been for over a decade.

Prior Proceedings

Calloway commenced this ation of December 2, 1982 and the resulting pretrial proceedings are reflected in the court's opinions of March 17, 1983, June 30, 1983, December 22, 1983, July 3, 1984, October 15, 1984, January 16, 1985, January 29, 1985, August 21, 1985, and February 26, 1986. While familiarity with these opinions is assumed, the most significant aspects of these proceedings can be summarized as follows:

On June 30, 1983, the complaint was dismissed pursuant to Rule 8, Fed.R.Civ.P. for failure to plead the copyright infringement claim with sufficient specificity. The court found that the original compaint failed to specify the dates and occasions on which the alleged infringement occurred and also failed to set forth the registration number of the copyright. Moreover, that opinion noted the ambiguity in the complaint as to whether there were two copyrights on "The Skyrider" and the question as to which one was infringed.

Following service of the amended complaint, the defendants again sought to dismiss. On December 22, 1983, the amended complaint was dismissed as to defendants Peter Shukat, Scott Shukat and The Shukat Company for failure to state

a copyright infringement claim against them. The complaint did not allege that Peter Shukat had a financial interest in the infringing activities or that he supervised, induced or materially contributed either to the infringement or to distribution of the infringing work. As to Scott Shukat, the amended complaint merely contained a single conclusory paragraph stating that he "directly contributed" to Marvel's creation of the infringing work. This, however was specifically refuted by the uncontradicted affidavit of Scott Shukat that he had no knowledge of the infringing work until long after it was prepared and distributed. Thus, the federal copyright claims against each of these defendants was dismissed along with the pendent state law claims. With regard to the other

defendants, the third cause of action for conspiracy to violate the copyright act and the fourth cause of action requesting punitive damages for copyright infringement were dismissed but otherwise the complaint withstood the motions of these defendants to dismiss.

After a period of discovery, the remaining defendants Marvel, Galton, Brodax, Klein and Quiros brought a motion for summary judgment pursuant to Fed.R.Civ.P.56. The defendants' main contention on this motion was that they were authorized to use Calloway's copyrighted work by virtue of several agreements dated June 8, 1981 between Calloway and LMN Productions (the "Option Agreement", "Writer's Agreement" and "Composition Agreement").

In opposing the summary judgment motion, Calloway submitted a fourteen-page affidavit sworn to on April 2, 1984. In that affidavit, Calloway explained that the amended complaint differed from the original complaint by omitting any reference to:

> those documents which I learned in the interim, had been contrived and forged by defendants. Instead, the amended complaint charged:
>
> > 52. On or about August 5, 1981, without plaintiff's knowledge or consent, Peter Shukat improperly affixed a facsimile of plaintiff's signature to a series of documents, backdated to June 8, 1981, purporting to confirm by formal agreement the terms and conditions of a putative option for LMN to acquire "The Skyrider."
>
> The documents referred to above, which I believe Peter Shukat contrived (and others perhaps forged) while he was my attorney and trusted advisor, are: The option agreement, the writer's agreement and the composition

> agreement and the composition agreement, all dated June 8 1981.
> . . .

Although Calloway thus asserted that he had not signed these documents and therefore denied that they constituted an authentic license, he never set forth any basis for this claim. No explanation was proffered regarding the circumstances by which the documents could have been forged or the circumstances which caused Calloway to discover the alleged facsimile and forgery only after the original complaint was filed.

It is appropriate to quote at length from the court's opinion at this critical juncture in the litigation: In denying the defendants' motion for summary judgment the court found that:

> Calloway does not dispute defendant's contention that the

terms of the Option Agreement would authorize defendants' acts, but states by affidavit that he never signed or approved the Option Agreement and that Peter Shukat, without Calloway's knowledge, affixed a facsimile of Calloway's signature to the agreemnt. Later in his affidavit, however, Calloway states that he "never signed or authorized the signing of any 'option' agreement in my individual capacity. I only signed such agreements as an officer of Netta Productions, Inc. Nor did I sign any such option in August, 1981." Calloway has not explained the inconsistency between these two statements. His having signed the Option Agreement "as an officer of Netta Products, Inc." appears to be without significance in this context. Calloway annexed the Option Agreement as an exhibit to the original complaint and did not challenge the authenticity of the Option Agreement during earlier motions in this case. He appears to contend that he signed an option agreement on June 8, 1981, in which he reserved the right to make all artistic decisions concerning "The Skyrider," but that the agreement he signed was altered without his consent, and that he did not discover these alterations until after he filed the complaint.

Calloway has by a narrow margin put sufficient facts in

> contention to withstand defendants' summary judgment motion. However, Calloway should be aware that this court has awarded attorney's fees against a plaintiff who was found after trial to have pursued a claim in bad faith and without factual support.

Following the denial of summary judgment, pretrial discovery continued and was marked by such acrimony between the parties that it was necessary to appoint a special master to supervise the concluding phases of discovery. In addition, Peter Shukat, Scott Shukat and SCL were reintroduced into the action as third-party defendants based on the allegations that they altered or executed agreements without Calloway's knowledge or consent and thus should be held liable as third party defendants for any judgment which might be recovered against the alleged copyright infringers. On the eve

of the trial, Calloway moved to reassert his state law claims against Peter Shukat, Scott Shukat and SCL based on pendent jurisdiction. This motion was granted in part to permit the trial of certain misrepresentation claims against these defendants arising out of the same facts upon which the third party claim was based.

Calloway's pretrial order, which was served March 25, 1986, set forth all of the claims still outstanding against the defendants. The pretrial order restated the allegations contained in paragraph 52 of the complaint that Peter Shukat "improperly affixed a facsimile of plaintiff's signature to a series of documents." At the final pretrial conference on March 31, 1986, counsel for Calloway was asked to clarify his client's

claims regarding the alleged document tampering by Peter Shukat. At that time, counsel stated that "[t]he claim is that there are two pages of a document, the signature[s] of which were altered and they were slapped on to another document which the man never saw or signed." At the conclusion of this conference, the court granted defendants' request for a written clarification of the document tampering claim and directed Calloway to submit an amendment to his pretrial order.

An amendment of plaintiff's pleadings and contentions was submitted by letter dated April 1, 1986. In that amendment, Calloway finally specified his claims of document tampering as follows:

> The irregularities with reference to the agreements effected by and at the direction

> of defendant Peter Shukat included physical separation and manipulation of the pages of the agreements to which plaintiff's signature had been affixed, and the alteration of the signature pages after plaintiff had signed them by obliterating one or more words with whiteout, by retouching plaintiff's signature, a portion of which had been covered, and the insertion of the signature of defendant Klein, without plaintiff's knowledge, consent or expectation of any such changes.
>
> Defendant Peter Shukat did all of the foregoing, aided and abetted by the other defendants, both to defraud Calloway and to misappropriate THE SKYRIDER.

Thus Calloway at this time formally abandoned his prior allegations that Peter Shukat and others had forged or applied a facsimile of his signature to the option ageements.

Trial was commenced on April 7, 1986 by the selection of a jury which had been demanded by Calloway. It continued until May 13, 1986. Eighteen witnesses were

heard, and over 326 exhibits were identified, many of which were admitted.

Calloway was further questioned about the facsimile signature claim during the course of trial. On cross-examination, he stated that he made the claim of facsimile in his amended complaint and that he had never withdrawn such a claim. In deposition testimony read at trial, Calloway stated that by using the word facsimile, he meant that his signature was placed on one document and then put on to another document and this was a facsimile because "[i]n a sense they imitate my signatures . . . ." Calloway admitted on cross-examination that he had "no real evidence" that Peter Shukat forged his signature and no real evidence that Peter Shukat contrived the option

agreements other than that which had been developed by his counsel.

At the conclusion of the plaintiff's case, the defendants moved to dismiss each of the claims raised against them. Although expressing serious reservations about many of the issues raised, the court declined to grant the motions with one exception. Calloway's claim of document tampering was dismissed since there was no evidence on which a reasonable jury could conclude that Peter Shukat had fraudulently altered or manipulated the option ageements. The only evidence presented with regard to this issue was some expert testimony which was inclusive and not probative of wrongdoing by Peter Shukat.

After the six-week trial concluded, the jury returned a verdict in favor of

all defendants. In particular, the jury answered the special verdict form in the following manner. First, the jury concluded that Calloway owned the entire copyrighted work including the material written by his associate David Stephen Roth as a work made for hire. Then the jury found that contrary to his testimony Calloway did not direct Scott Shukat not to sign the extension of the option agreements. Therefore, the option agreements were binding between Calloway and the defendants. Finally, the jury interpreted the option agreements to provide the defendants with the right to change or alter Calloway's copyrighted script and thus the use of the copyrighted material by LMN was sanctioned, and the copyright claim was denied. Finally, the jury found that neither Scott nor Peter

Shukat had intentionally misrepresented any material facts to Calloway, contrary to his testimony, and thus the fraud claims were denied.

The present motions were then filed with the permission of the court four weeks after the verdict was rendered, and were fully submitted on July 25, 1986.

The Facts

The facts, of course, were developed before the jury and constituted the foundation upon which its conclusions were reached. However, for the purposes of the issues now presented, it is appropriate that the following abbreviated facts be found.

No divergence of interest was present between the parties over the summer of 1981 when the documents which defined the relationship were prepared by Dumler &

Giroux, a firm specializing in such matters, representing LMN. The execution of the documents, while not performed with the utmost punctilio, was within the customary practice in such an undertaking. The signing of certain documents by Calloway as an officer of Netta was virtually a clerical oversight of insubstantial consequence. Calloway, who rested his alteration claim on this thin base, never offered any credible evidence to demonstrate that his performance as an officer of Netta had any significance.

The only difference between the parties in September, 1981 was a difference between Brodax and Calloway as to the amount of computerized animation to be used in the contemplated production. Brodax, possessed of considerable

experience in the field of animation, wanted as much as could be accommodated within the projected $5 million budget for production, and Calloway wanted more. Calloway at varying times had a more grandiose view of the budget, believing $12 million was a more appropriate figure. However, at no time did he express in a meeting with Marvel or in writing an unwillingness to proceed with production of the movie at the $5 million figure for which Marvel guaranteed to produce the film once the production financing was obtained. Marvel's interest was solely in making the film and using certain of the characters thereafter in comic books and related merchandising.

After the front money was in hand, which produced for Calloway the largest payment he had theretofore ever received

for his work, LMN sought with some help from Marvel to obtain the production financing. The effort was unsuccessful. "The Skyrider" was a naive, confused and conflicted work. Certain of its characters and lyrics, e.g., Chocolate Eclair, were inappropriate and even tasteless. One of its principal characters was "Ssendam," madness spelled backward, whose attributes included, like an actor, an ability to assume many forms and persona. Calloway's belief in the project was revelatory, tragic in some regard, and unwarranted by any objective analysis, at that time or subsequently. After the fall of 1981 Calloway did not participate in any effort to obtain financing.

By early 1982 Calloway became aware of the "bookends" prepared by Brodax for

use in the effort to obtain production funds. The Brodax material offended Calloway and cast "The Skyrider" in a light which he considered inappropriate and contrary to the purpose of the work. Advised by his close friend and later fiancee, who had served as a nonprofessional in a law firm, Calloway sought to obtain legal assistance to obtain redress from his former associates, Klein and Quiros, Marvel, counsel who had prepared the LMN documents, and Peter and Scott Shukat. In December of 1982 this action was brought.

At no time during the trial or during discovery was any evidence adduced to establish that Marvel's alleged infringement was responsible for any failure to obtain financing. The only

damage witness was an expert retained shortly before trial whose testimony failed to provide any basis upon which any actual damages could be calculated. All that was presented therefore was a naked non-economic claim of copyright infringement. Indeed, given the nature of the copyrighted material and the activities conducted, there never was any factual basis for any specific damages, nor any objective proof of causation.

Finally, there was little evidence regarding any intent of the defendants to misappropriate Calloway's copyright. In fact, the most probative indication of Calloway's tendency to imagine tortious conduct by the defendants was evidenced by an agitated discussion which he had with Lionel Barrett in April of 1982 that was later relayed to Peter

Shukat. At that time, Calloway claimed that the reason he was so distraught during the Tennessee incident in 1980 was that he was being poisoned by Klein. Despite this conveyed certainty of mind, in fact, Calloway had not met Klein at the time of the Tennessee incident. All these circumstances placed upon Calloway's counsel a heavy burden to investigate the foundation and details of Calloway's claims.

Discussion

The defendants seek sanctions for the conduct of Calloway and his counsel regarding the claims asserted in this action. The standards for an award of sanctions are well-established, but, of course, it is always a difficult and consuming task to determine whether the

test has been met under the particular circumstances presented by each case.

Rule 11

[1,2] Under Rule 11, ed.R.Civ.P., an attorney must certify that:

> he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing laws on a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .

As our Court of Appeals has explained, it is no longer possible for an attorney to avoid sanctions under Rule 11 merely by espousing a sincere good faith belief in the papers submitted under his signature. Eastway Construction Corp. v. City of New York, 762 F.2d 243, 253

(2d Cir. 1985). Instead, Rule 11 imposes an affirmative obligation on attorneys to scrutinize their own papers to determine whether the pleading is well grounded in fact and in law. The court's task in evaluating a Rule 11 motion is, therefore, to reexamine the pleadings and motions in light of the circumstances at the time they were submitted to determine whether the attorney upheld his obligation. Under the standards required by Rule 11:

> [S]anctions shall be imposed against and/or his client when it appears that a pleading has been interposed for any improper purpose or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law on a good faith argument for the extension, modification or reversal of existing law.

Id. at 254 (emphasis in original).

The defendants first urge that Calloway's copyright infringement claim was frivolous because there was no evidence that Calloway's copyrighted script was copied by the defendants. As the evidence at trial established, the allegedly infringing work was created by Marvel at the request of Klein and Quiros to assist in obtaining financing for the project. The Marvel presentation booklet appeared to have been comprised of a copy of "The Skyrider" synopsis created by David Steven Roth, a work which was itself never copyrighted. In addition, the Marvel presentation booklet included "bookends" of material independently created by Brodax with the exception of a single descriptive phrase taken from the copyrighted screenplay.

[3] The defendants incorrectly assert that this conduct could not possibly constitute copyright infringement. While the defendants cite 17 U.S.C. § 103 in supot of their argument, this reliance is misplaced. Section 103(b) provides that "[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." Based on this limiting language, the defendants contend that Calloway's copyright extends only to the revisions which he made to Roth's synopsis but not to the work of Roth itself. However, given the jury's finding on Question 1 of the special verdict, this

limitation does not apply here. The jury concluded that Roth's synopsis was a work made for hire and thus, in accordance with 17 U.S.C. § 201(b), Calloway as the employer of Roth must be considered the author of that work as of the time it was created. Although the synopsis was not itself copyrighted, the material from the synopsis which was included in Calloway's copyrighted script did obtain copyright protection and was owned exclusively by Calloway as a work for hire. Therefore, the defendants' claim on this issue is reduced to whether the copying of a prior draft of a copyrighted work could constitute copyright infringement. Such an issue presented a question of fact which was not frivolous under the circumstances of this case. Similarly, the defense of fair use would have

required a fact specific balancing of factors which would not have absolutely foreclosed Calloway's claim.

On the other hand with regard to the issue of "unauthorized" use, an element essential to any copyright claim, Calloway had signed the Option Agreement which granted the defendants the right to use his copyrighted script for the purposes of raising financing for the proposed movie. The granting clause of the Writer's Agreement, one of two agreement annexed to the Option Agreement set forth the following transfer of rights from Calloway to LMN:

> Writer hereby grants to Producer, exclusively and perpetually, all now or hereafter existing rights of every kind and character whatsoever, whether or not such rights are now known, recognized or contemplated, and the complete unconditional and

> unencumbered title throughout the world in and to: Writer's services pursuant to this agreement; any and all results and proceeds thereof; and any and all literary, dramatic and musical material, incidents, plots, dialogue, characters, action, gags, routines, ideas, inventions and other material written, composed, submitted, added, improvised, interpolated and invented by Writer hereunder . . . .
>
> Producer may add to, subtract from, arrange, rearrange, revise and adapt all such material in any manner, and Writer hereby waives the "moral rights" of authors, as said term is commonly understood. All such material and the worldwide copyright therein (including all renewals and extensions of such copyright) shall automatically be and become the property of Producer and Producer shall be deemed to be author thereof, Writer acting entirely as Producer's employee for hire.

Faced with this broad authorization to the defendants, Calloway opposed their summary judgment motion in April, 1984 by claiming that he did not sign the Option Agreements and that it was

improperly extended by an extension agreement prepared in September, 1981. The extension agreement was signed on Calloway's behalf by his agent and attorney-in-fact, Scott Shukat, but Calloway claimed that he had directed both Scott and Peter Shukat not to grant any further extensions.

[4] As to the first of these claims, it is now apparent that there was no basis in fact for Calloway's assertions and insufficient inquiry by his counsel. Calloway's statement that he did not sign the Option Agreement inserted into the action the issues of forgery, manipulation and facsimile signature which created smokescreens during the subsequent two years of discovery. A document examiner was apparently not consulted until six months after Calloway

asserted by affidavit that the documents were not authentic.

This examiner testified at trial that when she was consulted by Calloway's counsel in November 1984, she evaluated the signatures on the Option Agreement and concluded that all of the signatures written above the printed words "Northern J. Calloway" were written by one person. During discovery, the defendants sought to obtain this evaluation by Calloway's document examiner, yet none of the relevant interrogatories were meaningfully answered by the plaintiff. Indeed, by order of July 3, 1985, the court barred any introduction of expert handwriting testimony due to Calloway's failure to provide appropriate discovery, unless good cause was later shown. This order was modified on the eve of trial

to permit Calloway to offer the testimony of his expert witness notwithstanding the previous two years of evading appropriate discovery. At the time of trial, after another examination of the documents, Calloway dropped his claims regarding forgery and facsimile signature and focused instead on various other alleged manipulations.

[5] Therefore, notwithstanding Calloway's sworn statement that he did not sign the Option Agreement, he later considered this claim to be so insubstantial that he did not seek to present it to the jury. The withdrawal of a claim does not in itself require a finding that the claim was originally asserted in violation of Rule 11, since a party may in the course of discovery obtain new facts which reveal the weakness

of an allegation in the complaint. However, in the present case, the basis for Calloway's forgery and fascimile claim should have been known at the time it was originally asserted. It is apparent now that Calloway himself had no basis to make that claim, since he admitted at trial that the evidence regarding this issue was developed by his attorney and not from his personal knowledge of his signature or his actions. Calloway further stated that he was unable to determine for sure whether his signatures were authentic. On the other hand, counsel for Calloway had not yet consulted any expert at the time of the summary judgment motion, and even when an expert was obtained, no material evidence of forgery or facsimile was discovered.

Given the admitted absence of any affirmative evidence from either the signatory on the documents that Calloway's signature was not genuine, it is inconceivable that this allegation could have been made in accordance with the obligations imposed by Rule 11. Instead it appears that in their ambition to maintain this action, Calloway and counsel allowed his inconclusive inability to recognize his signature to be translated into a conclusive denial of his signature. When the central basis for opposing summary judgment is proffered on such an insignificant foundation, Rule 11 sanctions are

appropriate.[1]

In addition to claiming that the Option Agreement was not genuine, Calloway also asserted that Peter and Scott Shukat had improperly granted an extension of the Option Agreement without his consent. This claim, along with all the other claimed misrepresentations by Peter and Scott Shukat, involved statements and

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1. The other document manipulation claims asserted by Calloway were raised only after it became apparent that forgery or fascimile signature allegations could not be pressed any further. These evolving claims regarding whiteouts, additions of another party's signature and alleged removal were so insignificant and immaterial that they were eventually dismissed by the court.

events between these parties which did not permit independent verification. Thus there is no way to determine whether or not these claims had a reasonable basis in fact.

[6] Nevertheless, it is necessary to realize that these claims against Peter and Scott Shukat would not have established Calloway's claim for copyright infringement. As their principal, Calloway was necessarily responsible for all of the acts of his agents -- Peter and Scott Shukat -- in connection with their representation of him in The Skyrider movie project. Therefore, in addition to establishing that the Shukats committed certain wrongful acts, it would also have been necessary for Calloway to show that the

copyright defendants had knowledge of the Shukats' allegedly unauthorized acts.

To bridge this gap, Calloway's pleadings repeatedly alleged the existence of a conspiracy between all the defendants as well as claims that other defendants aided and abetted the Shukats in their wrongful acts. Thus, by referring collectively to all the defendants Calloway sought to infer that the copyright defendants knew of the Shukats' acts. Again, however, these claims were never substantiated by facts. No circumstantial evidence was presented to indicate that either of the Shukats sought to engage in joint action with the other defendants. Indeed, the copyright claims against them were dismissed on this basis. Scott Shukat's uncontradicted affidavit established

that he was unaware of the allegedly unlawful Marvel presentation until long after the Option Agreement was extended. In closing argument, Calloway's counsel never even suggested that there was evidence on the trial record of such knowledge on the part of the copyright defendants.

[7] Even the final link in Calloway's copyright claim was flawed. Calloway contended at trial that the Option Agreement did not by its terms authorize the defendants to alter or change Calloway's copyrighted script during the option period. In arguing on this point, his counsel stressed that it could not have been the intent of the parties to transfer all of Calloway's rights in the property at the outset of the option period since it was at that time possible

that the movie project might not have raised the necessary financing. Notwithstanding the logic of this position, the plain meaning of the Writer's Agreement contained no such limitations. Instead, the broad language quoted above was a present tense transfer which took effect as soon as the agreement became operative which in turn occurred at the time the $35,000 in front money was paid. Of course, the court is obligated to apply the plain meaning of a contract without regard to the parole evidence available. Thus, even if the jury had returned a favorable verdict on this issue, it would have been overturned by the court as a matter of law.

To be clear, Calloway's assertions at trial regarding the Shukats' misrepresentations and meaning of the

Writer's Agreement cannot in themselves be considered frivolous contentions that merit Rule 11 sanctions. At the same time, however, they indicate the overall insubstantiality of Calloway's copyright action. Seen in this light, it becomes even more evident that Calloway's baseless assertion of forgery and manipulation of documents was an ill-advised attempt to bolster an otherwise weak case. It was this additional frivolous allegation which prevented analysis of the true merits of Calloway's claim at the time of summary judgment in 1984.

17 U.S.C § 505

The above discussion of whether attorneys' fees may be awarded under Rule 11 is equally applicable with regard to the defendants' motion for sanctions

under 17 U.S.C. § 505. This section of the copyright act provides an independent statutory basis pursuant to which "the court in its discretion may allow the recovery of the full costs by or against any party. . . [including] a reasonable attorney's fee to the prevailing party as part of the costs."

[8-10] Under the law of this Circuit, attorneys' fees are awarded to a prevailing defendant only in exceptional circumstances. See Diamond v. Am-Law Publishing Corp., 745 F.2d 142 (2d Cir. 1984). Such circumstances do not require a finding of subjective bad faith, but rather depend on an objective finding that the plaintiff's allegations were without merit. Given the similarity between the standard for Rule 11 violations and the standard for

exceptional circumstances under §505, an award of attorneys' fees would also be appropriate on this statutory ground. Moreover, this case is analogous to Mailer v. RKO Teleradio Pictures, Inc., 332 F.2d 747 (2d Cir. 1964), where the plaintiff brought a meritless copyright claim in the face of an agreement which had authorized the defendants' actions. In such circumstances where the plaintiff brings suit for a copyright violation despite the existence of an agreement pursuant to which the defendants acted in good faith, the imposition of attorneys' fees does not chill the availability of this federal cause of action for copyright owners who seek to enforce their rights against unauthorized uses.

In addition, the cited authorities suggest that Peter and Scott Shukat should recover attorneys' fees in connection with the copyright actions filed against them in the original complaint. As in Diamond, the copyright allegations were asserted against the Shukats merely as a means of obtaining federal jurisdiction over additional defendants. Where a copyright action is pressed for such a reason, attorneys' fees may be awarded no matter how meritorious are the plaintiff's state law claims. 745 F.2d at 148.

28 U.S.C. §1927

[11] Defendants also seek attoneys' fees pursuant to 28 U.S.C. § 1927 which provides that:

> Any attorney or other person admitted to conduct cases in any

> court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

While the facts described above and the prior orders of the court suggest that certain of the proceedings were marked by unnecessary and vexatious conduct by Calloway's counsel, prior abuses were corrected at the time they occurred. Moreover, to the extent that the frivolous assertion of document tampering claims resulted in the unreasonable multiplication of the pretrial proceedings, such a violation of an attorney's responsibilities is more appropriately addressed under Rule 11.

Quiros has brought a motion under § 1927 which applies peculiarly to him.

Following the court's opinion of February 26, 1986, which recognized that Quiros' discharge in bankruptcy had extinguished all of Calloway's monetary claims for alleged liabilities owed by him, Quiros made an offer of settlement which provided Calloway with all the relief which he could possibly expect to recover from Quiros. However, counsel for Calloway flatly refused this offer without explanation and continued litigation against Quiros until finally accepting the same offer after trial had commenced.

[12] This motion by Quiros is well founded and indicative of the inexplicably obscure litigating postures adopted by counsel for the plaintiff. Sanctions will be awarded for counsel fees incurred during the delay caused by this resistance. The settlement

agreement between Quiros and Calloway, offered prior to trial, does not prevent sanctions against opposing counsel resulting from vexatious conduct which delayed the execution of the settlement.

Inherent Power of the Court

[13] As stated in Nemeroff v. Abelson, 704 F.2d 652, 654 (2d Cir. 1982): "A prevailing defendant is entitled to an award of attorneys' fees if a plaintiff brings or maintains an action without adequate factual basis and in bad faith." In order to invoke the inherent power of the court, therefore, a finding of bad faith or improper purpose must be reached in addition to the findings set forth above. This court has had some experience with litigation in which the trial record revealed that incorrect versions of the facts were knowingly given by an

interested party. See Schwartz v. Malm, 80 Civ. 6449, slip op. (S.D.N.Y. September 28, 1983) [Available on WESTLAW, DCTU database]. There, after a jury verdict which dismissed the plaintiff's malpractice claim, costs and attorneys' fees were taxed after the court concluded that false testimony had been given in order to create a factual basis for the malpractice claim.

[14] In this case, it has been demonstrated that Calloway's affidavit on the summary judgment motion was set forth without adequate factual basis. There is, however, no direct evidence to indicate that he was aware at the time of his sworn statement that it was untruthful. In fact, Calloway's unusual demeanor as a witness at trial suggests that he may have been unaware of the

consequences of his statements. On numerous occasions during his trial testimony, Calloway displayed an unabashed willingness to testify in a manner directly contradictory to his prior deposition testimony. When confronted with these inconsistencies, Calloway simply replied that he had no explanation. I conclude from these affectless responses that Calloway's inability to give consistent and forthright testimony resulted from his willingness to follow his attorney's advice rather than his own intent to misrepresent the facts. In addition, one must give some consideration to the medical history of Calloway which creates some uncertainty about his capability as a witness. Thus, I conclude that bad

faith on the part of Calloway has not been established.

[15] In addition, it is necessary to consider whether there has been bad faith on the part of Calloway's counsel. Counsel's failure to develop any evidence of joint participation by the copyright defendants in the allegedly unauthorized acts of Calloway's agents and the continuation of the lawsuit after dropping the forgery and facsimile signature claims come very close to establishing bad faith. See Nemeroff, supra, 704 F.2d at 659. However, I conclude that counsel's actions were not motivated by an improper purpose but rather resulted from his difficulty in evaluating and managing the issues raised by this litigation. In particular, despite the allegations of multimillion

dollar damages, counsel failed to make any attempt to establish a foundation for these economic damages until just a few weeks before trial when he first consulted an expert witness regarding the value of movie merchandising rights. Even this expert was not competent to establish whether Calloway's script was likely to be produced and financed. Perhaps the positions taken by counsel were designed to induce a profitable settlement. It is equally possible that the difficulties resulted from a conviction that Calloway's persuasive abilities could convince a jury to return a favorable verdict. Indeed, Calloway's protracted direct examination supports the latter view. On balance, while I conclude that counsel failed to recognize his responsibility to research the factual

basis of the claims thoroughly, to evaluate the extremely limited merits of this action and to assist a pliant client with limited capabilities, I do not believe that counsel's deliberate bad faith has been established.

The Measure of Sanctions

Since it has been concluded that sanctions are appropriate under Rule 11, and alternatively that this was an exceptional case meriting an award of attorneys' fees pursuant to 17 U.S.C. § 505, the amount of sanctions to be awarded must be determined.

This has been a long, arduous and expensive suit. After three and a half years of pretrial proceedings and six weeks of trial, it is no surprise that the legal bills rendered to the defendants and their insurance carriers have been

enormous. According to the affidavits submitted in support of the present motions, the defendants have incurred the following attorneys' fees: Marvel and Galton -- $297,000; Brodax -- $221,000; Klein -- $165,000; Peter Shukat -- $151,000. Defendants Scott Shukat and SCL have not set forth the legal fees incurred in defense of this action but have indicated that more that $60,000 were billed for the period between November, 1985 and May, 1986. Defendant Quiros was represented on a pro bono basis. Therefore, in the aggregate, the defendants have been forced to incur approximately $900,000 in attorneys' fees by reason of this action. Calloway has not contended that these attorney fees are unreasonable.

[16, 17] Under Rule 11, a court is not obligated to grant the full amount of attorneys' fees incurred by the prevailing parties, since such an award is primarily intended to impose a deterrent sanction against the conduct of plaintiff's counsel rather than simply to compensate the defendants for their out-of-pocket losses. See Anschutz Petroleum Marketing Corp. v. E.W. Saybolt & Co., Inc., slip op., 82 Civ. 4498 (S.D.N.Y. April 22, 1986) [Available on

WESTLAW, DCTU database][1] In determining an appropriate sanction, a court should consider the gravity of the Rule 11 violation, the circumstances of the

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1. Similarly, an award of attorneys' fees pursuant to the statutory authority of 17 U.S.C. §505 is "at bottom an equitable matter" which is within the discretion of this court. Faraci v. Hickey-Freeman Co., Inc., 607 F.2d 1025, 1028 (2d Cir. 1979). The award of attorneys' fees pursuant to this alternative holding would be in the same amount as the sanctions awarded under Rule 11 since I conclude, even without supporting affidavits by the plaintiff, that a full award of the defendants' aggregate attorneys' fees would subject Calloway to financial ruin.

violation within the context of the case, and the financial resources of the respective parties. As to this last factor, there is no evidence on the record regarding the financial condition of either Calloway or his counsel. However, I can quickly conclude that an award of the full amount of the attorneys' fees would be extremely onerous for anyone other than a substantial corporation. Furthermore, the Rule 11 violation was limited to only one of several issues raised by the plaintiff and cannot be regarded as causing all of the expenses incurred by defendants. On the other hand, I regard the violation in this case to be a very serious breach of the obligations of an attorney to conduct a reasonable inquiry into the factual circumstances underlying a pleading

motion, for this case could have been resolved at a much earlier stage if the baseless assertions of forgery and document manipulation had not been made. Perhaps this case is a classic demonstration of the desireability of the English practice, toward which Rule 11 seems to be pointing. However, the journey has not yet been completed, and it is necessary under our present practice to assess costs and expense on an other than automatic basis.

[18] I conclude, therefore, that a substantial sanction should be imposed. Under the circumstances set forth above, a sanction of $200,000 should impose upon the plaintiff and his counsel a sobering realization of the transgressions which have been committed. This amount is also roughly equivalent to the average expense

of each defendant and thus reflects the burden which each was forced to bear without unduly punishing the plaintiff.

I also conclude that the sanctions should be borne equally by Calloway and his counsel. It is, of course, difficult to allocate responsibility for the frivolous assertions made by Calloway and on his behalf by counsel, especially where the plaintiff has a history of mental illness which may have contributed to his lack of restraint in this action. However, it is apparent from the record that Calloway, by his sworn statements, and counsel by his failure to investigate the basis for those statements, each contributed to the violation of Rule 11. Each person failed to uphold his responsibility to set forth accurate facts in opposition to the defendants'

motion for summary judgment, perhaps in the vain hope that the other person had some basis for such assertions. In any case, each will be assessed sanctions of $100,000. These sanctions will be awarded pro rata to each defendant in proportion to the amount each expended to defend this action, with the exception of Quiros who agreed to settle before the conclusion of trial without costs against Calloway.

[19] In addition, I conclude that Peter and Scott Shukat are each entitled to a reasonable attorneys' fee of $5,000 for defending against the copyright claims which were dismissed on the pleadings and that counsel for Quiros is entitled to $23,000 for the vexatious conduct which delayed his settlement.

Cross-Motions Regarding Taxation of Costs

[20] Calloway and the defendants have brought cross-motions pursuant to Rule 54(d) contesting the costs taxed against Calloway by the clerk of the court on June 27, 1986. Calloway asserts that the fees of the Special Master should not be included in the costs because at the time of his appointment the court decided that:

> The Special Master will be compensated monthly on an hourly basis at his customary rates and will submit statements to the parties to that end, each party to pay his or its aliquot shares. Upon final resolution of this action, these payments may be subject to a further application for costs.

Master's fees are ordinarily taxable as costs, unless otherwise ordered by the court. Local Rule 11(c)(8). As provided by Local Rule 19(d) which more specifically addresses the taxation of master's fees: "Where, however, the court

directs by order the party against whom, or the proportion in which [a master's] compensation and disbursements shall be charged, . . . the party making payment to the master shall be entitled to tax such compensation or disbursements only against such parties and in such proportions as the court has directed. . . ." The order which provided for proportionate sharing of the master's fees was never altered following the conclusion of trial or the entry of judgment. In accordance with Local Rule 19(d), this order prevails over the customary taxation of master's fees and therefore the costs will be amended to omit them.

The parties also dispute whether the court reporter fees for "transcript[s] necessarily obtained for use in the case"

where appropriately taxed by the clerk. Peter Shukat claimed such costs in the amount of $6,979.32 which the clerk reduced to $5,861.60. Marvel and Galton requested such costs in the amount of $11,333.20 which were disallowed entirely. The costs attributable to Marvel and Galton were billed in connection with the daily transcripts ordered for two pretrial conferences and the trial. It is unclear for what proceedings Peter Shukat claimed transcription costs.

[21] I conclude that the daily transcripts for the trial and the two conferences were indeed necessary and not merely convenient. See In re Air Crash Disaster, 687 F.2d 626, 632 (2d Cir. 1982). Here, just as in Galella v. Onassis, 487 F.2d 986, 999 n.22 (2d Cir.

1973), the transcripts were needed because "the amounts claimed were large, the trial was of considerable length, and credibility crucial." Therefore, the transcription costs claimed by Marvel and Galton will be granted.

[22] Apparently, Peter Shukat did not order transcripts during the trial but instead shared the transcripts ordered by Marvel and Galton. Thus, lacking any explanation by Peter Shukat, it appears that these costs were connected to pretrial depositions. There is no reason to shift these costs to Calloway and, therefore, the taxed costs will be amended to omit them.

[23] Calloway also challenges the amounts taxed in favor of Peter Shukat and Marvel on the grounds that they are excessive. However, since Calloway

failed to make these objections in writing or at the time of taxation, the clerk had discretion to tax those costs in the amount he considered appropriate. See Local Rule 11(b).

Finally, Calloway's motion to stay the taxation of costs during the pendency of his appeal has been mooted by a lack of prosecution of that appeal resulting in its dismissal.

Conclusion

For the reasons set forth above, the defendants will be granted $200,000 in attorneys' fees as Rule 11 sanctions. The award will be divided as follows in amounts proportional to the fee statements submitted by counsel for the defendants. Thus, Marvel and Galton will be awarded $66,000; Brodax, $49,440; Klein, $37,000; Peter Shukat, $33,860;

Scott Shukat and SCL, $13,700. These amounts will be paid equally by Calloway and his counsel, Pavelic & LeFlore.

Peter Shukat will be awarded $5,000 and Scott Shukat and SCL will be awarded $5,000 to be paid by Calloway pursuant to 17 U.S.C. §505. Finally, counsel for Quiros is entitled to $23,000 from Pavelic & LeFlore as a sanction under 28 U.S.C. §1927.

The clerk is directed to amend the bill of costs to eliminate all requests to tax the special master fees and to eliminate Peter Shukat's request to tax the costs of transcripts. The clerk is directed to award Marvel and Galton their request to tax costs in the amount of $11,333.20 for the cost of trial and conference transcripts.

IT IS SO ORDERED.

APPENDIX C

Northern J. CALLOWAY, individually and on Behalf of LMN Productions, Inc., Plaintiff,

v.

The MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORPORATION, James Galton, Al Brodax, Michael S. Klein, Luis Quiros, The Shukat Company, Ltd., Scott Shukat, Peter S. Shukat, Esq., Defendants.

The MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORPORATION, James Galton, Al Brodax, Michael S. Klein, Luis Quiros, and LMN Productions, Inc. Third Party-Plaintiffs,

v.

The SHUKAT COMPANY, LTD., Scott Shukat, Peter S. Shukat, Esq., Third-Party Defendants.

No. 82 Civ. 8697 (RWS).

United States District Court, S.D. New York.

Dec. 23 1986

Radovan S. Pavelic, New York City, pro se and for LeFlore.

Ray L. LeFlore, New York City, pro se.

Sheber, Pomerantz & Slotnick, New York City, for third-party defendants Scott Shukat and The Shukat Co., Ltd.; Sol V. Slotnick, of counsel.

Brown, Wood, Ivey, Mitchell & Petty, New York City, for defendant Luis Quiros; Stewart J.M. Breslow, of counsel.

Fred E. Sharf, New York City, for defendants The Marvel Entertainment Group and James Galton.

Arnoff & Merin, P.C., New York City, for third-party defendant Peter Shukat; Norman Arnoff, of counsel.

Brookman & Brookman, P.C., New York City, for defendants Michael Klein and LMN Productions, Inc.; Michael D. Brookman, of counsel.

Santora & McKay, New York City, for defendant Al Brodax; Robert McKay, of Counsel.

SWEET, District Judge.

Radovan S. Pavelic ("Pavelic") has moved pursuant to Fed.R.Civ.P. 60(b) for an order amending this court's opinion of August 1, 1986 and order of September 12, 1986 so as to (1) relieve from and not to impose Rule 11 sanctions against the law firm of "Pavelic & LeFlore," but rather the individual attorney responsible for the signing and signer of the pleadings in question, Ray L. LeFlore, and (2) relieve from and not to impose sanctions pursuant to 28 U.S.C. § 1927 against the firm of "Pavelic & LeFlore," but rather individual counsel, Ray L. LeFlore. For the reasons discussed below, this motion is granted in part and denied in part.

In its August 1 opinion, this court imposed Rule 11 Sanctions against the law firm of Pavelic & LeFlore, based on the finding that allegations of forgery and manipulation of documents set forth in the complaint and subsequent papers had no basis in fact. The individuals who signed these papers were Ray L. LeFlore, Esq. ("LeFlore") and Northern J. Calloway ("Calloway"), the plaintiff in this action. Pavelic signed none of the papers in this action until post-trial motions were made.

The prior proceedings in this action are summarized in this court's opinion of August 1, 1986, 111 F.R.D. 637, 640-43, and will not be repeated here. This action was commenced on December 29, 1982. At that time, the law firm of Pavelic & LeFlore did not yet exist; counsel of

record was the law firm of LeFlore & Egan. Pavelic & LeFlore was formed in October, 1984.[1]

Rule 11 states in relevant part:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least

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1. By affidavit, Pavelic states that the firm of Pavelic was "not formally formed" until October, 1984 and that LeFlore did not sign any papers on behalf of Pavelic & LeFlore in this action until December, 1984. LeFlore responds by affidavit that the federal tax returns filed for the partnership for the year 1984 specifically state that such returns for Pavelic & LeFlore are for the period "May 1, 1984 through December 31, 1984." For the purposes of this motion, the date October, 1984 will be used.

> one attorney of record in his individual name, whose address shall be stated . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . . If a pleading, motion, or other papers is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 thus speaks expressly in terms of the attorney who signs a paper "in his individual name," of the "signature" and "knowledge, information and belief" of an attorney, and of "the person who signed [a paper]." See Northern Trust Co. v. Muller, 616 F. Supp. 788, 789 (N.D.Ill.

1985). It does not expressly address the situation at issue here -- whether the court can impose sanctions on a law firm, rather than an individual, as the "person who signed" the paper "in violation of this rule." The law firm is the attorney of record, and it is the law firm on whose behalf the papers are signed.

While New York State Partnership Law does not control in an interpretation of Rule 11, it is instructive on whether a partnership should be held responsible for one partner's acts and omissions. Paragraph 24 of the Partnership Law states:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is

> incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

N.Y. Partnership Law §24 (McKinney 1948).

Although the Second Circuit in Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), discussed Rule 11 in terms of the "signer's conduct," id. at 1274, it was not concerned with the imposition of sanctions on the law firm as "signer" rather than the individual attorney. This court and others, however, have not hesitated to impose sanctions on the law firm on whose behalf a meritless pleading was signed. In Anschutz Petroleum Marketing Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355 (S.D.N.Y. 1986), the Honorable Charles S. Haight imposed Rule 11 sanctions on the law firm as well as the client. Similarly, in Sony Corp v.

S.W.I. Trading, Inc., 104 F.R.D. 535, 542 (S.D.N.Y. 1985), the Honorable David N. Edelstein imposed sanctions on the defendant's law firm for making a frivolous motion to vacate a default judgment. Cf. Multiphase Trading Ltd. v. Weldon F. Stump & Co., No. 84 Civ. 1470 (S.D.N.Y. March 8, 1985) [Available on WESTLAW, DCTU database] (refusing to impose sanctions against the law firm rather than the individual attorney on grounds other than lack of power to sanction the law firm). In Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D.Cal. 1984), rev'd on other grounds, 801 F.2d 1531 (9th Cir. 1986), the district court imposed Rule 11 sanctions on the firm of Kirkland & Ellis for the filing of a frivolous motion, even though an associate of the

firm acknowledged responsibility for the preparation of the motion and local counsel signed the papers. In Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985), the Seventh Circuit affirmed the imposition of sanctions on the state attorney under the "respondeat superior" doctrine for an infraction by an assistant state attorney. Id. at 260.

The purpose of the 1983 amendments to Rule 11 was to increase the effectiveness of Rule 11 in deterring abuses by expanding the equitable doctrine permitting the court to award expenses to a litigant whose opponent sets forth frivolous claims and defenses. See Fed.R.Civ.P. 11 Advisory Committee Note. This stated purpose is furthered by including as a "person" who signed a paper the law firm in whose name and on whose

behalf it was signed. The partnership, as counsel of record, should have as much of a stake in certifying the factual and legal basis of a paper as the individual who signs it on the partnership's behalf. Only if the partnership as a whole is held responsible for the acts of its attorneys will the potential of the rule in curbing abuses be fully recognized. Cf. Northern Trust Co. v. Muller, 616 F.Supp. 788, 789 (N.D.Ill. 1985) ("This court need not decide whether, under the realities of law firm practice, any room exists for reading Rule 11 more expansively than its individualized language, so as to extend liability to the firm as well as to the individual signer").

[1,2] In sum, sanctions will be imposed on both the individual attorney

and the law firm on whose behalf he signed the papers. In addition, the amount of attorneys' fees charged to Pavelic & LeFlore must be reduced to take account of the period of time in which the firm of Pavelic & LeFlore was not in existence. During the period from December 29, 1982 to October, 1984, LeFlore signed papers including the complaint, amended complaint, and papers in opposition to a motion for summary judgment. From October, 1984 the date that Pavelic & LeFlore was formed, to the trial date in April, 1986, further papers were signed on behalf of Pavelic & LeFlore, including the pretrial order, served on March 25, 1986. Pavelic & LeFlore cannot be held responsible for papers signed before the firm came into existence. In Oliveri, the Second Circuit held that the

application of Rule 11 is limited to testing the attorney's conduct at the time the paper is signed. See Oliveri, supra, 803 F.2d at 1274-75. Since there is no continuing obligation on the part of the attorney to withdraw a paper asserting a claim that later proves to be groundless, Pavelic & LeFlore cannot be held responsible for pleadings signed prior to October, 1984.[1]

Looking back on the four years which this action consumed, it is impossible

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1. Pavelic's claim that Pavelic & LeFlore was never formally substituted as counsel and therefore cannot be subject to sanctions is without merit. It is undisputed that the firm was representing Calloway from October, 1984 through the end of trial.

to allocate to individual pleadings, motions or other papers the reasonable expenses incurred by the defendants in defending against the frivolous allegations. Instead, it is appropriate to allocate the $100,000 in sanctions on the basis of the fraction of the four years in which Pavelic & LeFlore was in existence. Since this action consumed twenty-one months before the creation of Pavelic & LeFlore in October, 1984, and twenty months until the end of trial in May, 1984, this court shall impose sanctions of $50,000 on Ray L. LeFlore individually, and $50,000 on Ray L. LeFlore and Pavelic & LeFlore, jointly and severally.

[3] Pavelic also challenges the imposition of sanctions pursuant to 28 U.S.C. § 1927 against the firm of "Pavelic

& LeFlore" for refusing an offer of settlement from defendant Luis Quiros ("Quiros"), following the court's opinion of February 26, 1986, that would have provided Calloway with all the relief he could possibly expect to recover from Quiros, who had been discharged in bankruptcy. To impose a sanction under 28 U.S.C. § 1927 requires a "clear showing of bad faith" on the part of the attorney. Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1010 (2d Cir. 1986). Although this court's opinion of August 1 did not explicitly state that Pavelic & LeFlore was acting in bad faith, the circumstances surrounding the rejection of the settlement offer at that time, including the failure to explain the refusal of the offer, demonstrate bad faith.

[4] Pavelic also argues that Quiros has waived his right to request sanctions under 28 U.S.C. § 1927. After trial had commenced, Pavelic & LeFlore accepted the same settlement offer. The stipulation and order dismissing the action against Quiros provided that "this action is dismissed, pursuant to Fed.R.Civ.P.41(a), as against Mr. Quiros with prejudice and without costs to each party as against the other." While "costs" would include attorneys' fees in cases where statutorily conferred attorneys' fees are involved, see Marek v. Chestny, 473 U.S. 1, 105 S.Ct. 3012 87 L.Ed.2d 1 (1985), they should not include attorneys' fees imposed as a sanction for the bad faith refusal of the same settlement offer earlier in the litigation.

[5] Therefore, the imposition of $23,000 in attorneys' fees on Pavelic & LeFlore under 28 U.S.C. § 1927 is reaffirmed.

IT IS SO ORDERED.

APPENDIX D

PAVELIC & LeFLORE *v.* MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORP., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-791. Argued October 2, 1989—Decided December 5, 1989

Federal Rule of Civil Procedure 11 provides in pertinent part that pleadings and other papers shall be signed by at least one attorney of record in the attorney's individual name, which signature shall certify that he or she has read the paper and believes it to be well grounded in fact and law; and that, "[i]f a . . . paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction." In the present case, the District Court imposed a Rule 11 monetary sanction against the law firm of the signing attorney, rejecting the firm's contention that it could be imposed only against the individual signer. The Court of Appeals affirmed.

Held: When read in the context of all of Rule 11's signature provisions, the phrase "person who signed" connotes the individual signer mentioned at the outset of the Rule and authorizes a court to impose a sanction only against that individual. That is so even when the individual explicitly signs *on behalf of* the firm, since it is only the signature "*in the attorney's individual name*" which complies with the Rule's requirement and to which the latter portions of the Rule attach consequences. Pp. 123-127.

854 F. 2d 1452, reversed in part and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 127.

Jacob Laufer argued the cause for petitioner. With him on the briefs was *Patricia M. Karish*.

Norman B. Arnoff argued the cause for respondents and filed a brief for respondent Shukat. *Robert B. McKay* and *Sol V. Slotnik* filed a brief for respondents Marvel Entertainment Group et al.

JUSTICE SCALIA delivered the opinion of the Court.

Federal Rule of Civil Procedure 11 provides in part: "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction . . . ." In this case we must determine whether Rule 11 authorizes a court to impose a sanction not only against the individual attorney who signed, but also against that attorney's law firm.

I

The action giving rise to the current controversy was instituted by plaintiff Northern J. Calloway against respondents for willful copyright infringement of his motion picture script and other related claims. The original complaint—signed and filed by Calloway's attorney, Ray L. LeFlore—alleged that Calloway had developed an idea for a motion picture and written a script, and that respondents had begun to develop this work without his permission. Respondents filed a motion to dismiss, pointing to a series of documents annexed to the complaint that gave them the right to develop the work commercially. The District Court dismissed the complaint (with leave to refile), not on the ground that the documents authorized the alleged infringement, but because Calloway's complaint had failed to specify the registration number of his copyright and the dates upon which the alleged acts of infringement had occurred.

An amended complaint, again signed by LeFlore, was filed several weeks later. In addition to remedying the defects that were the basis of dismissal, it newly asserted that Calloway's signatures on the documents purporting to grant an option had been forged by respondents, and included that among the actions for which damages were sought. Plaintiff relied on this forgery claim in opposing respondents' motions to dismiss and motions for summary judgment.

son v. *National Cash Register Co.*, 808 F. 2d 1119, 1128–1130 (1987). We granted certiorari, 489 U. S. 1009 (1989).

II

We give the Federal Rules of Civil Procedure their plain meaning, *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 750, n. 9 (1980), and generally with them as with a statute, "[w]hen we find the terms . . . unambiguous, judicial inquiry is complete," *Rubin* v. *United States*, 449 U. S. 424, 430 (1981). The specific text of Rule 11 at issue here is the provision that requires a court, when a paper is signed in violation of the Rule, to "impose upon the person who signed it . . . an appropriate sanction." Thus viewed in isolation, the phrase "person who signed" is ambiguous as to the point before us today. That is not so, however, when it is read in the total context of all the provisions of Rule 11 dealing with the signing of filings. Those provisions (all of Rule 11 except two sentences) are as follows:

> "Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the at-

> tention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

In other contexts the phrase "the person who signed it" might bear the somewhat technical legal meaning of the natural or juridical person in whose name or on whose behalf the paper was signed; but in a paragraph beginning with a requirement of individual signature, and then proceeding to discuss the import and consequences of signature, we think references to the signer in the later portions must reasonably be thought to connote the individual signer mentioned at the outset. It is as strange to think that the phrase "person who signed" in the last sentence refers to the partnership represented by the signing attorney, as it would be to think that the earlier phrase "the signer has read the pleading" refers to a reading not necessarily by the individual signer but by someone in the partnership; or that the earlier phrase "[i]f a pleading . . . is not signed" refers not to an absence of individual signature but to an absence of signature on behalf of the partnership. Just as the requirement of signature is imposed upon the individual, we think the recited import and consequences of signature run *as to him*.

Respondents' interpretation is particularly hard to square with the text since they do not assert that "the person who signed," and who "shall" be sanctioned under the Rule, is *only* the partnership (that would obviously be unacceptable), but rather is *either* the partnership *or* the individual attorney, *or* both, at the court's option. But leaving that option unexpressed seems quite inconsistent with the extreme care with which the Rule, in the very same sentence, makes clear

that the mandatory sanction must extend to "the person who signed [the paper], a represented party, or both." It is surely puzzling why the text would be so precise about that but leave to speculation whether only the individual attorney or his firm or both can be sanctioned. The puzzlement does not exist, of course, if "the person who signed" means *only* the individual attorney.

Respondents appeal to "long and firmly established legal principles of partnership and agency," Brief for Respondents Marvel Entertainment Group et al. 29, under which all the members of a partnership are liable for the authorized acts of a partner or employee, see Restatement (Second) of Agency § 140 (1958). We are not dealing here, however, with common-law liability, but with a Rule that strikingly departs from normal common-law assumptions such as that of delegability. The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment. Where the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed. We think that to be the fair import of the language here.

Respondents also rely upon the fact that after formation of the partnership LeFlore's signature was explicitly *on behalf of* the firm. The simple response is that signature on behalf of the firm was not a signature that could comply with the first sentence of the Rule, and not a signature to which the later portions of the Rule attach consequences. Rule 11 says that papers must be signed "by at least one attorney of record *in the attorney's individual name*." (Emphasis added.) Even if LeFlore's signature in the fashion indicated had the effect of making the firm and all its partners (including himself) attorneys of record, it is only his signature *in his individual name* that satisfies the first sentence of the Rule, and

it is that signature, in that individual capacity, to which the later portions of the Rule refer. It has long been thought the better practice for the attorney complying with Rule 11 not to sign *for* his firm, but to sign in his individual name and on his own behalf, with the name of his firm beneath. See Gavit, The New Federal Rules and State Procedure, 25 A. B. A. J. 367, 371 (1939) (Under Rule 11, "the practice for pleadings to be signed in the name of a partnership" is "undesirable" and "improper").

Respondents, and the opinion of the Court of Appeals, rely heavily upon the contention that the policies underlying Rule 11 will best be served by holding a law firm accountable for its attorney's violation. In the Court of Appeals' words, "[law firm] responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims." 854 F. 2d, at 1480. Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it.

But in any event it is not at all clear that respondents' strained interpretation would better achieve the purposes of the Rule. It would, to be sure, better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney. The purpose of the provision in question, however, is not reimbursement but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that *these* purposes are better served by a provision which makes clear that, just as the court expects the signer personally—and not some nameless person within his law firm—to validate the truth and legal reasonableness of the papers filed, so also it will visit

upon him personally—and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone*, is precisely the point of Rule 11. Moreover, psychological effect aside, there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership of which he may not (if he is only an associate) be a member, or which (if he is a member) may not choose to seek recompense from him. To be sure, the partnership's knowledge that it was subject to sanction might induce it to increase "internal monitoring," but one can reasonably believe that more will be achieved by directly increasing the incentive for the individual signer to take care. Such a belief is at least not so unthinkable as to compel the conclusion that the Rule does not mean what it most naturally seems to say.

For the foregoing reasons, the judgment of the Second Circuit is reversed insofar as it allows Rule 11 sanctions to be imposed against Pavelic & LeFlore. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, dissenting.

We have consistently held that a trial judge bears the primary responsibility for managing the cases before him. One of the fundamental purposes of Rule 11 is to strengthen the hand of the trial judge in his efforts to police abusive litigation practices and to provide him sufficient flexibility to craft penalties appropriate to each case. The Court's interpretation of Rule 11, in contrast, is overly restrictive, as it reads into the Rule an absolute immunity for law firms from any sanction for their misconduct.

Although the Court recognizes that the relevant phrase in Rule 11—"the person who signed" the pleading, motion, or paper at issue—could mean a *juridical* person on whose be-

half the document is signed, *ante*, at 124, it nonetheless finds that the phrase has a more limited meaning in the context of the Rule as a whole. As I cannot acquiesce in such an unnecessary erosion of the discretion of federal trial judges, I dissent.

The Court's reading of the "plain meaning" of Rule 11 is based entirely on the connection it perceives between the language at the beginning of the Rule, which refers to an individual "'signer,'" and the crucial language in the last sentence, which allows a court to impose sanctions on "'the person who signed'" a pleading or paper. *Ante*, at 123–124. Although the text of the Rule does not foreclose the reading the Court finds compelling, that interpretation is by no means the only reasonable one—and certainly is not required by the "plain meaning." Significantly, in three separate places the Rule identifies the person signing a document as the "signer." Yet it uses an entirely different phrase, "the person who signed" the pleading, in its listing of parties who may be sanctioned for violations, thereby drawing an explicit distinction between the two phrases. If the drafters had intended to limit the entity that could be sanctioned under the Rule to the individual signer, they easily could have repeated the word "signer" a fourth time. The use of different phrases may reasonably be viewed as an indication of two different meanings. In the case of "signer," the drafters unambiguously sought to refer to the individual who actually signed the document; in their subsequent use of the phrase "the person who signed," the drafters may have signaled their intent to allow a court to impose sanctions on any juridical person, including the law firm of the individual signer. In the context of the Federal Rules of Civil Procedure, drafted by a committee familiar with traditional legal concepts, one can reasonably assume that the word "person" indicates more than just natural persons, encompassing partnerships and professional corporations as well. See, *e. g.*, 5 U. S. C. §551(2) (Administrative Procedure Act defines

"person" as an "individual, partnership, corporation, association, or public or private organization other than an agency"); N. Y. Partnership Law §2 (McKinney 1988) (defining "person" to include "individuals, partnerships, corporations, and other associations"). At the least, an interpretation of Rule 11 that gives "person" its legal meaning is no less plausible than the majority's more restrictive reading of the Rule.

The purposes of the Rule support this construction of Rule 11. All pleadings, motions, and papers must be signed by an attorney in his *individual* name. This requirement serves in part the administrative goal of identifying for the court one person who can answer questions about the papers. Because Rule 11 proceedings often occur at the end of litigation, see Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 129 (1982 ed., Supp. V), it will often be crucial that the relevant documents, which may have been filed months or even years earlier, identify a specific individual with knowledge of their contents. No such administrative concerns suggest that the phrase "the person who signed" the paper should be restricted to an individual.

Furthermore, as the majority emphasizes, *ante*, at 126, the requirement of an individual signer promotes a measure of individual accountability by ensuring that someone takes direct responsibility for each filing. Yet encouraging individual accountability and firm accountability are not mutually exclusive goals. Indeed, individual accountability may be heightened when an attorney understands that his carelessness or maliciousness may subject *both* himself and his firm to liability. The concern that a person take direct responsibility for each paper is not disserved by holding the law firm responsible in cases where the district court determines that both are blameworthy. In short, it is not internally inconsistent, nor does it inevitably lead to "puzzling" results, *ante*, at 125, to allow a trial judge the discretion to impose sanctions on a law firm, a juridical person, for which a signing attorney acts as agent.

The policies underlying Rule 11 decisively indicate that "person" should be interpreted broadly so that a court can effectively exercise discretion in formulating appropriate sanctions. Although, as the majority infers from the Rule's text, one purpose of Rule 11 may be "to bring home" to the individual signer his personal responsibility for complying with its dictates, *ante*, at 126, the Rule is *explicitly* designed to deter improper pleadings, motions, and papers. Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 129 (1982 ed., Supp. V) ("The word 'sanctions' in the caption . . . stresses a deterrent orientation in dealing with improper pleadings"). Admittedly, in some cases, sanctions imposed solely on the individual signer may halt abusive practices most effectively. In other cases, however, deterrence might best be served by imposing sanctions on the signer's law firm in an attempt to encourage internal monitoring. The trial judge is in the best position to assess the dynamics of each situation and to act accordingly.

Recognizing the need to tailor the sanction to each particular situation, the Advisory Committee emphasized in a related context the need for "flexibility" in dealing with violations. See *ibid.* (discussing the effect of the words "shall impose" on the trial court's discretion to impose sanctions). Flexibility is no less important when a judge decides whether one, some, or all of the many entities before him should be held responsible for improper pleadings, motions, or papers. Where, as here, the Rule itself does not demand rigidity, it is unwise for the Court to constrict the options available to a trial judge faced with a violation of Rule 11. The judge who observes improper behavior and who is intimately familiar with the facts of a case should be allowed to fashion the penalty that most effectively deters future abuse. Today's decision unwisely ties the hands of trial judges who must deal frequently and immediately with Rule 11 violations and ill serves the goal of administering that Rule justly and efficiently. See Fed. Rule Civ. Proc. 1.

The District Court apportioned the sanction here between the signing attorney and his law firm, based on its assessment of the relative culpability of each. *Calloway* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 650 F. Supp. 684 (SDNY 1986). I firmly believe that this sort of penalty is precisely what Rule 11 contemplates. I therefore cannot join the Court's reading of the Rule which creates an immunity for law firms from its coverage.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1054—August Term, 1991

(Submitted: February 19, 1992

Decided: November 9, 1993)

Docket No. 91-9118

ESTATE OF NORTHERN J. CALLOWAY, individually and on behalf of LMN PRODUCTIONS, INC.,

Plaintiff,

—v.—

THE MARVEL ENTERTAINMENT GROUP, a division of Cadence Industries Corporation, JAMES GALTON, AL BRODAX, MICHAEL S. KLEIN, LUIS QUIROS, and, where necessary LMN PRODUCTIONS, INC.,

Defendants-Third-Party Plaintiffs-Appellees,

—v.—

DUMLER & GIROUX, SHUKAT CO. LTD., SCOTT SHUKAT, & PETER S. SHUKAT, ESQ.,

Third-Party Defendants-Appellees,

RAY L. LEFLORE, as defendant on the Rule 11 award,

Appellant.

Before:

FEINBERG, NEWMAN, and WINTER,
Circuit Judges.

Appeal from a decision on remand of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) reinstating a Rule 11 monetary sanction against the Estate of Northern J. Calloway. The court found Calloway's attorney, Ray L. LeFlore, jointly and severally liable for that sanction.

We affirm in part and vacate in part.

RAY L. LEFLORE, *pro se*, New York, New York, *for Appellant.*

ROBERT B. MCKAY, New York, New York (Carney & McKay, New York, New York), *for Defendants-Appellees The Marvel Entertainment Group, James Galton, Al Brodax, and Peter S. Shukat, Esq.*

WINTER, *Circuit Judge*:

This is the second appeal in this matter. After a remand, Judge Sweet reinstated monetary sanctions pursuant to Fed. R. Civ. P. 11 in the amount of $100,000 against the Estate of Northern J. Calloway. The court found Calloway's counsel, Ray L. LeFlore, jointly and severally

liable for the sanction. LeFlore appeals. We affirm in part and vacate in part.

BACKGROUND

We will not reiterate at length the background of this appeal because of the detailed description in our previous decision, *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1455-67 (2d Cir. 1988), familiarity with which is assumed. We briefly recap the salient facts, however. In 1982, Calloway filed an action seeking $11 million in compensatory damages and punitive damages in an unspecified amount, in which he claimed willful copyright infringement of his motion picture script concept entitled *The Skyrider*. Appended to the original complaint as exhibits were documents purporting to be agreements between Calloway and several of the defendants ("the Agreements"). These Agreements posed a considerable obstacle to Calloway's claim, however, because they authorized the defendants to engage in the alleged infringing acts.

Thereafter, LeFlore signed an Amended Complaint and Calloway signed a supporting affidavit that disavowed the Agreements. They alleged that Calloway's signature was forged or was merely a facsimile affixed to the documents ("the facsimile claim"). A later version of the disavowal of the Agreements conceded that Calloway had signed them but alleged document tampering or "alterations" after he had signed them ("the white-out claim").

Relying upon the facsimile claim as detailed in an affidavit by Calloway and memoranda prepared by LeFlore, Judge Sweet denied a motion for summary judgment. Had the motion been granted, the complaint would have been dismissed. Shortly before trial, the facsimile claim was

abandoned, and the white-out claim was asserted. At trial, the district court directed a verdict against Calloway regarding the white-out claim. The trial largely concerned a claim of oral misrepresentation that was itself belatedly raised, and the jury held against the plaintiff on all claims.

The defendants moved for Rule 11 sanctions. Rule 11 states that:

> [e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the . . . paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, of good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . .

Fed. R. Civ. P. 11. Upon a violation of this rule, the court must impose sanctions. *Id.*

After a hearing on the Rule 11 motion, Judge Sweet determined that neither Calloway nor LeFlore had a good faith basis for making the facsimile claim. He therefore sanctioned Calloway $100,000, and, after initially sanctioning the law firm of Pavelic & LeFlore $100,000, modified the sanction against the firm to impose a $100,000 sanction against LeFlore, of which the law firm was jointly and severally liable with LeFlore for $50,000. *See Calloway v. Marvel Entertainment Group*, 650 F. Supp. 684, 688 (S.D.N.Y. 1986).

Upon appeal, we affirmed the imposition of sanctions against LeFlore and Pavelic & LeFlore for pursuing the

facsimile claim. We *sua sponte* reinstated Calloway's *pro se* appeal, which had been dismissed for failure to prosecute, and remanded to the district court for a determination as to whether the sanction imposed against Calloway should be reinstated or modified. We also remanded for a determination whether LeFlore should be jointly and severally liable for Calloway's sanction, either alone or with Pavelic & LeFlore.

Pavelic & LeFlore petitioned for, and was granted, certiorari in the Supreme Court. The Court held that only the individual attorney who signed papers, and not the attorney's law firm, could be sanctioned under Rule 11. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). This of course did not disturb the $100,000 sanction imposed against LeFlore, who had not petitioned for certiorari. Nor did it affect the remand to determine his joint and several liability for the $100,000 sanction against Calloway.

After our remand, Calloway died. The district court held a hearing and reinstated the $100,000 sanction against Calloway's estate and held LeFlore jointly and severally responsible for that sanction. The court awarded interest on this portion of the judgment from the original date of entry. LeFlore then filed this appeal to challenge the aggregate $200,000 sanction for which he is now liable.

DISCUSSION

Relying primarily on *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, 498 U.S. 533 (1991), LeFlore contends that he cannot be jointly and severally liable for the $100,000 sanction against Calloway's estate. However, nothing in *Business Guides* undermines our ear-

lier decision that persons liable for Rule 11 sanctions may be jointly and severally liable. 854 F.2d at 1477.

In *Business Guides*, the Court held "that a represented party who signs his or her name bears a personal nondelegable responsibility to certify the truth and reasonableness of the document." *Id.* at 547. The responsibility of a signing client thus cannot be delegated to his or her attorneys, although as to matters of law the reasonableness of a client's signing of a paper may be based on advice of counsel. LeFlore argues that joint and several liability is inconsistent with the nondelegability of Rule 11 obligations. We disagree.

Business Guides does not preclude an attorney from being jointly and severally liable for papers signed by a party where the attorney has signed similar or supporting papers and the resultant abuse of judicial processes must be attributed to the offending papers as a whole. In the instant matter, LeFlore signed the amended complaint, and Calloway's affidavit in opposition to the motion for summary judgment was prepared by LeFlore and was in effect incorporated by reference in LeFlore's memorandum of law and reply memorandum. The amended complaint raised the facsimile claim, and the papers in opposition to the motion for summary judgment effectively prevented the dismissal of the complaint. *See* 854 F.2d at 1463. The Rule 11 violation was thus a coordinated effort, and joint and several liability is entirely appropriate.[1] Joint and several liability in no way relieves

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1 LeFlore contends that Judge Sweet's ruling on remand was in error because it failed to comply with *Business Guides*' holding that "Rule 11 imposes an *objective* standard of reasonable inquiry on represented parties who sign papers or pleadings." 498 U.S. at 544 (emphasis added). However, as Judge Sweet noted, we determined on the prior appeal that the offending papers signed by Calloway violated an objective standard of reasonableness. *See* 854 F.2d at 1474-75.

Calloway or his estate from his nondelegable obligations under Rule 11. While *Business Guides* might shed light on a claim for contribution, it has no bearing on the present issues.

On remand, Judge Sweet allowed LeFlore and a psychiatrist, Dr. Hugh F. Butts, to testify. LeFlore argues that we should vacate all the sanctions against him based on this testimony. We disagree. Our prior opinion stated:

> The record demonstrates beyond argument LeFlore's indifference to whether the facsimile claim had a factual basis. When the original documents (textually identical to the exhibits to the original complaint) were produced by the defendants, they contained several minor changes involving the obvious use of white-out, which the district court quite properly deemed "insignificant and immaterial." 111 F.R.D. at 647 n.2. It is conceivable that a reasonable lawyer viewing these documents for the first time would conclude that an inquiry should be made into the alterations. However, nothing on the face of these documents suggests the affixation of a facsimile signature or forgery.
>
> LeFlore did not retain a handwriting or document expert until November 1984, more than one year after he signed the amended complaint and more than six months after writing the affidavit for Calloway stating that the signatures on the agreements were not genuine and filing other papers saying the contracts were "forged" and "signed by others." This expert, Pearl Tytell, compared the original set of documents with several checks bearing five of Calloway's genuine signatures. On the basis of this examination, she told LeFlore that all the agreements were "probably"

> signed by the same person and "possibly" by the signer of the checks. At trial, she testified that she *never* considered the signatures on the June 8 agreements to be facsimile signatures, nor did she know of any evidence that they were not genuine. Calloway's deposition was taken after Tytell had made an oral report to LeFlore. When Calloway stated in that deposition that he was relying upon an expert's opinion to support the facsimile claim, LeFlore knew that no such opinion existed and that the expert actually refuted the claim. Nevertheless, LeFlore declined to drop the claim.
>
> Finally, we note that Calloway's testimony regarding the facsimile claim was inconsistent and sometimes unintelligible and that he may have been mentally ill. These facts hardly justify pursuit of the facsimile claim, however. A reasonable attorney would not pursue a claim of forgery based on such equivocal evidence from such an untrustworthy source. A sensitivity to an attorney's obligation not to press baseless claims would call for caution in such circumstances rather than the headlong and heedless pursuit of a claim of the most serious misconduct by another attorney.

854 F.2d at 1471-72 (footnote omitted). LeFlore's testimony on remand in no way undermines these conclusions. As has been his consistent practice with regard to the Rule 11 issues, *see* 854 F.2d at 1468, his testimony never mentioned the facsimile claim but instead referred only to the white-out claim. However, the facsimile claim was the sole basis for sanctions, and LeFlore's testimony is, therefore, irrelevant. Dr. Butts' testimony also added nothing of substance. Dr. Butts may have provided some insight as to Calloway's mental illness and periods of remission, but

his testimony indicated little about Calloway's role in asserting the facsimile claim.

Nothing offered on remand warrants the vacating of sanctions against Calloway or LeFlore. The record supports Judge Sweet's finding that Calloway knew the facsimile claim to be baseless. The record also indicates that Calloway never provided LeFlore with a factual basis for the claim. In fact, LeFlore has never stated that Calloway provided him with such a basis, and, if Calloway had, the claim should have been dropped immediately after Calloway's deposition in which he testified that he believed his signatures were forged based on the opinion of a handwriting expert. LeFlore knew at that time that the handwriting expert did not support the facsimile claim yet did not withdraw it. As we held earlier, the failure to withdraw the claim at that time evidenced LeFlore's indifference throughout to whether the claim had a factual basis.

We are not unmindful of the size of the sanctions imposed on LeFlore or of the fact that sanctions in excess of an attorney's net worth may serve no useful purpose. For that reason, our prior opinion suggested that Judge Sweet might reduce the size of the sanctions imposed based on information concerning LeFlore's financial status. On remand, Judge Sweet invited LeFlore to submit a current financial statement. However, LeFlore declined the invitation and instead relied entirely upon a conclusory affidavit filed in 1987 as part of his opposition to the posting of a bond while moving for a stay pending appeal. As must have been obvious to LeFlore, this cursory response does not warrant a reduction of sanctions.

Relying again upon *Business Guides*, LeFlore argues that the sanctions constitute impermissible fee shifting. In

that decision, the Supreme Court explained that Rule 11 sanctions do not "shift the entire cost of litigation; they shift only the cost of a discrete event." 498 U.S. at 553. As we held in our earlier decision, however, the sanctions here were based on LeFlore's assertion of felonious conduct by Calloway's former lawyer. LeFlore never had any basis for the claim but asserted it in order to avoid a well-deserved grant of summary judgment. The size of the monetary sanction was commensurate with the egregious nature of the conduct, and the sanctions thus do not constitute impermissible fee shifting.

As part of this argument, LeFlore disputes whether the Rule 11 violations increased the defense costs of the Shukat defendants. The Shukat defendants were initially dismissed from the case but were brought back in as third-party defendants because of the meritless claims. The Shukat defendants thus deserve to receive a portion of the award.

Because Peter Shukat did not cross-appeal on the earlier appeal, LeFlore suggests that the addition of his joint and several liability for the sanctions imposed on Calloway's estate cannot redound to Shukat's benefit. We disagree. As noted, Rule 11 is not a fee-shifting mechanism and does not create an entitlement in adverse parties to compensatory damages or attorney's fees. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 409 (1990). Rather it is intended "to maintain the integrity of the system of federal practice or procedure." *Business Guides*, 498 U.S. at 552. The sanction can thus be imposed *sua sponte* by the court, and the district court can order the sanction to be paid into the court, *see* Fed. R. Civ. P. 11; *Cooter & Gell*, 496 U.S. at 408-09. Given the purpose of the rule and the wide discretion of the court, we see no

barrier to awarding sanctions in the instant case to a party that did not cross-appeal.

LeFlore also contends that he is not liable for interest on the judgment from the original date of entry. To support his position, LeFlore cites *Briggs v. Pennsylvania Co.*, 334 U.S. 304 (1948), in which a jury verdict for the plaintiff was vacated by the district court. Following a reversal on appeal, the district court reinstated the verdict with interest accruing from the date of the verdict. The Supreme Court held that the district court had no power to impose interest from the date of the vacated verdict.

Briggs, however, is in part inapposite. With regard to the $100,000 sanction on LeFlore and his firm, the judgment was entered and affirmed on appeal. Thus, the judgment has been in existence and accruing interest since it was first entered, as required by 28 U.S.C. § 1961 (1988).[2] *See also* Fed. R. App. P. 37; *Mathis v. Spears*, 857 F.2d 749, 760-61 (Fed. Cir. 1988) (holding that interest runs from the date of the judgment authorizing the right to the award, not from the date of a later judgment establishing its exact amount).

An award of interest against LeFlore on the $100,000 sanction against Calloway poses a different question because the judgment imposing joint and several liability on LeFlore was not entered until November 1991. LeFlore's liability for interest accruing on a judgment from the judgment's original entry date is not consistent with *Briggs* because LeFlore was not jointly and severally

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2 Section 1961 provides in pertinent part that:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . . Such interest shall be calculated from the date of entry of the judgment . . . .

28 U.S.C. § 1961 (1988).

liable for that judgment before November 1991. We therefore vacate the award of interest against LeFlore on the sanction on Calloway prior to the imposition of joint and several liability.

We therefore affirm in part and vacate in part. Costs to appellees.

APPENDIX F

ESTATE of Northern J. CALLOWAY, individually and on Behalf of LMN Productions, Inc., Plaintiff,

v.

THE MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORP., et al., Defendants.

The MARVEL ENTERTAINMENT GROUP, a DIVISION OF CADENCE INDUSTRIES CORP., et al., Third-Party Plaintiffs,

v.

DUMLER & GIROUX, the Shukat Company, Ltd., et al., Third-Party Defendants.

No. 82 Civ. 8697 (RWS).

United States District Court, S.D. New York.

Sept. 17, 1991.

Ronald W. Gill, Brooklyn, N.Y., for Estate of Calloway.

Carney & McKay, by Robert B. McKay, of counsel, New York City, for defendants Marvel Entertainment Group and Peter S. Shukat.

Ray L. LeFlore, pro se.

Stults & Marshall, by Sol V. Slotnick, New York City, for defendants Shukat Co. and SCL.

Michael B. Klein, DDS, pro se.

SWEET, District Judge.

On remand The Marvel Entertainment Group, a division of Cadence Industries Corp. and certain individual defendants (collectively "Marvel") and Dumler & Giroux, the Shukat Company, Ltd., and Peter Shukat (collectively "Shukat") have moved to impose sanctions in the amount of $100,000 against the estate of Northern J. Calloway ("Calloway") and his former counsel Raymond L. LeFlore ("LeFlore"), jointly and severally. The motion is granted.

Prior Proceedings

Calloway, represented by LeFlore, commenced this action in December 1982 seeking recovery of an aggregate amount of $66 million against Marvel and other defendants for infringement of Calloway's copyright in a work entitled

The Skyrider by making unauthorized changes in it and distributing it to certain third parties without proper authorization. Marvel maintained that certain written agreements, dated June 8, 1981, signed by Calloway authorized their acts.

In the spring of 1984, the Marvel defendants moved for summary judgment on the basis of the June 8, 1981 agreements. Calloway opposed the motion, claiming that Calloway's signature on the June 8, 1981 agreements had been forged.

By the July 3, 1984 decision, the motion was denied in an opinion which also stated:

> Calloway has by a narrow margin put sufficient facts in contention to withstand defendants' summary judgment motion. However, Calloway should be aware that this court has awarded attorney's fees against a plaintiff who was found after trial to have pursued a claim in bad faith and without factual support ... The Court will not hesitate to award such costs if the facts are found after trial to warrant such an award.

After a six-week jury trial and a defendants' verdict on May 13, 1986, defendants moved for sanctions as they had repeatedly warned Calloway and LeFlore that they would. Sanctions were imposed by this court in its decision of August 1, 1986 in the amount of $200,000 against

Calloway and the law firm of Pavelic & LeFlore ($100,000 against each). The Marvel defendants were awarded costs as well. 111 F.R.D. 637 (S.D.N.Y.1986). Later, in its decision of December 23, 1986, the August 1 decision with respect to the award of $100,000 in sanctions as against Pavelic & LeFlore, was amended by imposing $50,000 in sanctions against Ray L. LeFlore individually and $50,000 against Ray L. LeFlore and Pavelic & LeFlore, jointly and severally. 650 F.Supp. 684 (S.D.N.Y.1986).

LeFlore and Pavelic & LeFlore filed an appeal, *pro se*. Marvel filed a cross-appeal, seeking an increase in the amount of sanctions that had been imposed against LeFlore, his firm and Calloway.

In a decision dated August 12, 1988, the Second Circuit affirmed this court's imposition of sanctions as against the attorneys. At the same time, the panel retained jurisdiction of any further appeals in this case (854 F.2d 1452, 1483), and stated that:

> ... we are *sua sponte* recalling the mandate and reinstating Calloway's appeal in order to remand for a determination of the relative responsibility of Calloway and his attorneys for the conduct violating Rule 11 and the allocation of sanctions between them.

854 F.2d at 1473.

The Second Circuit found that there was a clear conflict of interest in Calloway's having been represented in the Rule 11 proceeding by LeFlore and his law firm, vacated the $100,000 in sanctions as against Calloway, remanding this matter back to this court with the following instructions, among others:

> The propriety of the portion of the Rule 11 sanctions imposed on the attorneys, $100,000 is thus clear. Less clear, however, is the liability of the attorneys for the $100,000 imposed solely upon Calloway, and we now remand for consideration of that issue. If on remand Judge Sweet decides not to reimpose some or all of the $100,000 sanctions on Calloway, a question then arises under the cross-appeal as to whether the attorneys should be made liable for the amount from which Calloway is then relieved in light of the fact that a finding of diminished responsibility on Calloway's part appears to imply increased responsibility on the attorneys' part. Even if on remand Calloway remains liable for some or all of the sanctions, we believe a question exists as to the appropriateness of joint and several liability of the attorneys for that amount.
>
> We believe these interrelated questions should be addressed as follows. We now affirm the $100,000 in sanctions imposed on the attorneys. On the remand that we have ordered in Calloway's reinstated appeal, Judge Sweet, applying the legal

> standards described above, should determine what portion, if any, of the $200,000 total sanctions is the responsibility of Calloway and impose either no sanctions on him or an appropriate amount between zero and the $100,000 originally imposed. If he revises the sanctions against Calloway from the $100,000 originally imposed, he should then consider whether the attorneys should be liable for that portion of the $100,000 no longer outstanding as to Calloway. We believe this is an issue fairly raised by the Marvel defendants' cross-appeal that seeks, *inter alia*, an increase in the sanctions imposed on the attorneys. The issue must be remanded, however. Judge Sweet's balancing of the numerous pertinent factors has now been undone by our remand of Calloway's appeal, and Judge Sweet should determine in the first instance the appropriate total mix of sanctions (in addition to the $100,000 affirmed) in the proceedings on remand.

854 F.2d at 1477.

At page 1466 of its decision, the Second Circuit stated:

> Neither Calloway nor LeFlore submitted an affidavit in opposition to the motions for sanctions, leaving all factual issues to be decided on the existing record.

and permitted limited supplementation of the existing record upon the remand:

> Calloway should also be allowed to make a factual submission in addition to the present record regarding his responsibility for the facsimile claim if he chooses. The attorneys may of course answer that submission.
>
> * * * * * *
>
> To some extent, the financial resources of the attorneys may be relevant to the remanded questions, and Pavelic and LeFlore should be allowed to supplement the record on that issue notwithstanding their failure to offer such evidence originally.

854 F.2d at 1478.

Thereafter, Pavelic & LeFlore, the law firm, was granted *certiorari* in the Supreme Court, which determined that Rule 11 did not permit sanctions to be imposed against a law firm, but only against an individual attorney citation. It otherwise left undisturbed the imposition of sanctions as against LeFlore. LeFlore himself did not seek *certiorari* in the Supreme Court.

The Estate of Northern J. Calloway is now a party to this action in place of the deceased Northern J. Calloway.

The Court of Appeals on June 13, 1990 filed its mandate in the district court, directing:

> that the matter be remanded to the District Court for further proceedings consistent with the opinion of this court [854 F.2d 1452 (1988)] as modified by the opinion of the Supreme Court (493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989)].

On the same day a pretrial conference was held and the parties were directed to complete discovery by August 15 and to submit a pretrial order on August 25, 1990. Requests by the parties to adjourn these dates were received and granted.

On January 25, 1991 the judgment against the firm of Pavelic & LeFlore was vacated. On June 21, 1991 the administratrix of the estate of Calloway by letter of counsel stated that the estate would not retain counsel in connection with any hearing which was finally scheduled for July 29, 1991.

On July 29 briefs and affidavits were received and over the defendants' objection testimony was taken from LeFlore and Dr. Calvin Butts, who had treated Calloway before and during the period of the underlying action.

The Facts

None of the facts relating to Rule 11 sanctions were altered by the testimony offered by LeFlore to the effect

that another lawyer had prepared Calloway for his trial testimony, which had been evaluated by both the trial and appellate courts. In addition, LeFlore testified that Calloway had understood the allegations which he had made in connection with his oath that he had not signed the documents which he claimed were forgeries.

Dr. Butts called as a witness by LeFlore testified that during the period in question Calloway exhibited excellent recollection and understanding, except when his judgment was impaired by his psychiatric condition but that during this period his condition was controlled by the treatment prescribed.

No documents were offered in connection with this testimony which in LeFlore's case was obviously self-serving and unopposed. The testimony offered no basis for a finding as to the relative responsibility as between LeFlore and Calloway for the statements made in Calloway's affidavit of April 24, 1984 which gave rise to the sanctions at issue.

LeFlore offered no evidence with respect to his financial condition other than that previously submitted to the Court of Appeals in connection with his stay application.

The Liability for Sanctions is Joint and Several

It was Calloway's affidavit, sworn to April 2, 1984, that was instrumental in defeating defendants' motion for summary judgment. In paragraph 7 of that affidavit, he swore under oath that he neither signed nor approved the June 8, 1981 agreements upon which Marvel and the defendants relied, which he said "were forged and contrived to deceive." The April 2, 1984 memorandum of law, signed by LeFlore, submitted in opposition to defendants' motion for summary judgment, referred to Calloway's affidavit and said on page 6 that:

> the only basis on which defendants could hope to obtain summary judgment in their favor is their claim that plaintiff signed or approved the agreements on which they purport to reply.
>
> Plaintiff's affidavit, sworn to April 2, 1984, unequivocally attests that he neither signed nor approved the agreements on which defendants purport to rely.
>
> * * * * * *
>
> There could be no clearer statement that defendants have nothing authentic on which to rely.

The Second Circuit concurred with this court's analysis:

> It appears, therefore, that but for the facsimile claim, the case would have been over. Because of that claim, the action continued as to eight defendants. On appeal, LeFlore disputes the conclusion that the facsimile claim was crucial by arguing that Judge Sweet denied the Marvel defendants' motion for summary judgment because of a claim of post-signature alterations in the text, the white-out claim, rather than the facsimile claim. However, the facsimile claim was the only alteration claim that had been made at the time of the summary judgment motion. The white-out claim was not made until two years later. The facsimile claim alone was thus the basis for Judge Sweet's decision to deny summary judgment, as his later imposition of sanctions expressly stated.

See 854 F.2d at 1463.

Although Calloway's April 2, 1984 affidavit was undoubtedly prepared by LeFlore, who was then representing Calloway as a single practitioner, nevertheless, Calloway did sign it under oath. Calloway's sworn denials were not, however, limited to that affidavit. He also testified under oath at numerous depositions (which were attended by LeFlore) and repeatedly swore that his signature was not on the various June 8, 1981 agreements.

At his deposition on November 6, 1984, Calloway swore under oath, with respect to his signature on Exhibit

2 at that deposition (the "Option Agreement"), "That signature I can state with absolute certainty is not mine." At the same deposition, he swore under oath with respect to his signature on Exhibit 3 at that deposition (the "Music Agreement"), "I can state with certainty that it is not mine." Similarly, with respect to Exhibit 4 at that deposition (the "Writers Agreement"), he testified, "With certainty, I can tell you that that is not my signature." Calloway went on to testify at that same deposition that he read the original complaint and its exhibits before the complaint was served. When asked if he informed anyone that the exhibits did not contain his genuine signature, LeFlore instructed Calloway not to answer, on the basis of the attorney-client privilege.

Two days later, on November 8, 1984, Calloway testified unequivocally that he "knew," before the original complaint was filed that the June 8, 1981 agreements--the tie-in or option agreement, the music agreement, the writers agreement and the shareholders' agreement--which were annexed to the complaint did not contain his genuine signature. Once again LeFlore, invoking the attorney-client privilege, refused to let Calloway answer whether he told anyone about these "forged" agreements. Indeed, at pages 184-85 Calloway testified that he did not tell anyone other than his attorney, about the "forged" documents.

Calloway further testified at his deposition on November 8, 1984 that he had read the amended complaint

before it was served and that he believed the allegations therein, which contained the accusations of forgery, to be true.

Notably, at Calloway's deposition on November 13, 1984, LeFlore stated:

> The witness has testified clearly and concisely as to what signatures do not appear to be his signature and which do.

In a conference before this court on December 5, 1984, the following colloquy took place between the court and LeFlore:

> THE COURT: So your position is that the signature on the document is a fake?
>
> LeFlore: Yes.
>
> THE COURT: And it was put on by somebody else in some device, as, obviously, in your view, by definition, unknown. He can say, "Yes, this appears to be my signature, but I didn't sign that document. Somebody must have jimmied the document."
>
> LeFLORE: Yes.

(Ex. 1, p. 889).

Calloway further testified at his deposition on February 13, 1985 that he was absolutely certain that he did sign agreements dated Jun 8, 1981 to which Netta Productions was a party.

At his deposition on April 12, 1985, Calloway incongruously admitted that he did sign the option agreement. Similarly, he admitted that he signed other June 8, 1984 agreements. Having abandoned the spurious forgery or "facsimile" claim shortly before the trial, Calloway was forced to admit at the trial that he had signed all of the June 8, 1981 agreements.

Some excerpts from Calloway's deposition were read into the record at the trial in April and May of 1986, which included the following sworn statement from Calloway's deposition of November 6, 1984, referring to the Option Agreement of June 8, 1981:

> That signature I can state with absolute certainty is not mine.

[1] Calloway thus admitted on various occasions under oath that he read the original complaint, and its exhibits (which included the June 8, 1981 agreements), before it was served; that he read the amended complaint before it was served; and that he told no one other than his attorney, LeFlore, that the June 8, 1981 agreements were allegedly forged. Calloway also swore under oath in his affidavit in April 1984 and at his depositions in November

1984 and February 1985 that his signature had been forged on the June 8, 1981 agreements. Yet during his depositions and at the trial in April and May 1986, Calloway also admitted, from time to time, that his genuine signature did appear on those agreements. These inconsistent assertions under oath, following his unequivocal affidavit of April 2, 1984 which was instrumental both in defeating defendants' motion for summary judgment, and in prolonging this case for another two years, culminating in a six-week trial, provide more than adequate justification for imposing sanctions of $100,000 (approximately 10% of the defendants' attorneys fees through trial) as against Calloway, now the estate of Calloway.

As to the issue of whether Calloway's conduct, for Rule 11 purposes, should be evaluated by an "objectively reasonable" test, or by a subjective standard, the Second Circuit stated:

> In imposing sanctions, Judge Sweet appears to have applied an "objectively reasonable" test to Calloway's conduct. That test, however, is appropriate only in evaluating the conduct of attorneys under Rule 11, not the conduct of parties represented by attorneys.
>
> * * * * * *
>
> We believe that a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful

> conduct, *e.g.*, the paper made false statements or was filed for an improper purpose.

854 F.2d at 1474.

The application of an objective standard of reasonableness in evaluating both a party's conduct and an attorney's conduct for purposes of Rule 11, has recently been stated by the Supreme Court decision in ***Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.***, -- U.S. --, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991). The Supreme Court in addressing the issue held:

> In sum, we hold today that Rule 11 imposes an objective standard of reasonable inquiry on represented parties who sign papers or pleadings.

111 S.Ct. at 934-35. Since this court has already determined that Calloway's conduct violated the objective standard of reasonableness under Rule 11, that finding need not now be disturbed on this record.

The sanctions previously imposed under Rule 11 are justified because Calloway signed numerous papers in violation of Rule 11--the principal one being his April 2, 1984 affidavit, but also his interrogatory answers, his responses to document requests, and his various deposition transcripts. As a party signatory to these various papers signed in violation of Rule 11, Calloway is subject to the sanctions of Rule 11.

Even if Calloway had not been a signatory of offending papers in violation of Rule 11, sanctions would properly be imposed upon him by virtue of the last sentence in Rule 11, which provides:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Calloway is thus properly subject to Rule 11 sanctions both because he was a represented party, and because he himself signed papers that violated Rule 11.

LeFlore's Responsibility

[2] The fact that Calloway bears responsibility under Rule 11 in no way diminishes LeFlore's greater responsibility for his actions as Calloway's attorney in this litigation. In no uncertain terms, the Second Circuit expressed its view that the lion's share of responsibility fell on LeFlore's shoulders. The following excerpts from the Second Circuit's opinion make this abundantly clear:

LeFlore did not retain a handwriting or document expert until November 1984, more than one year after he signed the amended complaint and more than six months after writing the affidavit for Calloway stating that the signatures on the agreements were not genuine and filing other papers saying the contracts were "forged" and "signed by others." This expert, Pearl Tytell, compared the original set of documents with several checks bearing five of Calloway's genuine signatures. On the basis of this examination, she told LeFlore that all the agreements were "probably" signed by the same person and "possibly" by the signer of the checks. At trial, she testified that she never considered the signatures on the June 8 agreements to be facsimile signatures, nor did she know of any evidence that they were not genuine. Calloway's deposition was taken after Tytell had made an oral report to LeFlore. When Calloway stated in that deposition that he was relying upon an expert's opinion to support the facsimile claim, LeFlore knew that no such opinion existed and that the expert actually refuted the claim. Nevertheless, LeFlore declined to drop the claim.

Finally, we note that Calloway's testimony regarding the facsimile claim was inconsistent and sometimes unintelligible and that he may have been mentally ill. These facts hardly justify pursuit of the facsimile claim, however, A reasonable attorney

> would not pursue a claim of forgery based on such equivocal evidence from such an untrustworthy source. A sensitivity to an attorney's obligation not to press baseless claims would call for caution in such circumstances rather than the headlong and heedless pursuit of a claim of the most serious misconduct by another attorney.

Id. at 1472.

* * * * * *

> LeFlore sought a stay pending appeal of the judgment awarding sanctions. In support of his motion, he submitted an affidavit that, astonishingly enough, asserted that the facsimile claim had never been made.

As articulated by the Second Circuit, and as evidence from the record in this case, LeFlore's responsibility for pursuing a baseless claim in violation of Rule 11 was abundantly clear based upon papers signed by LeFlore in violation of Rule 11, including the amended complaint; the memorandum of law of April 2, 1984 in opposition to defendants' motion for summary judgment; a reply memorandum dated May 3, 1984; responses to interrogatories dated April 22, 1985; other responses to interrogatories dated June 3, 1985; and an undated pretrial order

served on March 25, 1986--all signed by LeFlore, and all reiterating the baseless claim of forgery of the June 8, 1981 agreements.

The Second Circuit gave the following instructions with respect to the relative culpability of the attorney and his client under Rule 11:

> In the case of represented clients, the attorney has the principal responsibility for complying with Rule 11 and, where not misled by the client, may properly be jointly and severally liable for the judgment against his client. So long as the attorney was not misled by the client, the attorney's conduct is a proximate cause of the Rule 11 violation. How sanctions are to be structured, however, is largely a matter of the district court's discretion. We merely stress that it has power to impose joint and several liability on that portion of sanctions resulting from a party's misconduct where the attorney should have known that the misconduct violated Rule 11.

Id. at 1477.

* * * * * *

We also remand the issue of the attorneys' joint and several liability for amounts owed by Calloway, if any, after remand. We do so because Judge Sweet gave no reason for entering entirely

> separate judgments and may have believed that such judgments were required by the district court's decision in *Eastway [Construction Corp. v. New York*, 637 F.Supp. 558 (E.D.N.Y.1986)]. The district court stated there that clients may not reimburse lawyers for Rule 11 sanctions because the possibility of such reimbursement might eliminate the deterrent effect of Rule 11 on attorneys. 637 F.Supp. at 570. Here, however, we face a different situation, for the question whether Calloway may pay the judgment against LeFlore and the firm is not before us. Whether LeFlore and the firm should be jointly and severally liable for sanctions imposed on Calloway, in addition to the separate judgment against them, however, does fairly arise from Calloway's appeal. We believe district courts have discretion to make attorneys jointly and severally liable for sanctions against their clients where the attorneys should have known the conduct at issue violated rule 11.

Id. at 1477.

As this court stated in its August 1, 1986 opinion:

> However, in the present case, the basis for Calloway's forgery and facsimile claim should have been known at the time it was originally asserted. It is apparent now that Calloway himself had no basis to make that claim, since he admitted at trial

> that the evidence regarding this issue was developed by his attorney and not from his personal knowledge of his signature or his actions. Calloway further stated that he was unable to determine for sure whether his signatures were authentic. On the other hand, counsel for Calloway had not yet consulted any expert at the time of the summary judgment motion, and even when an expert was obtained, no material evidence of forgery or facsimile was discovered.
>
> Given the admitted absence of any affirmative evidence from either the signatory on the documents that Calloway's signature was not genuine, it is inconceivable that this allegation could have been made in accordance with the obligations imposed by Rule 11. Instead it appears that in their ambition to maintain this action, Calloway and counsel allowed his inconclusive inability to recognize his signature to be translated into a conclusive denial of his signature. When the central basis for opposing summary judgment is proffered on such an insignificant foundation, Rule 11 sanctions are appropriate.

111 F.R.D. at 647.

In the face of post-trial motions from all of the defendants seeking sanctions under Rule 11, LeFlore submitted no affidavit from either himself or Calloway

before his death attempting to justify or explain their four and one-half years of behavior. In essence, he proffered but one argument: that this court, in denying the motion for summary judgment in 1984, and in permitting this case to go to the jury in May of 1986, had effectively immunized him from the obligations and sanctions of Rule 11. As this court and the Second Circuit agreed, that argument was meritless.

While Calloway's history of mental illness might provide some explanation as to the why of his conduct in this lawsuit, as this court stated in its 1986 opinion, after alluding to Calloway's prior mental illness:

> All these circumstances placed upon Calloway's counsel a heavy burden to investigate the foundation and details of Calloway's claims.

111 F.R.D. at 645. LeFlore did not attempt to meet this burden. He and Calloway must account for their flagrant violations of Rule 11:

> ... [I]t is apparent from the record that Calloway, by his sworn statements, and counsel by his failure to investigate the basis for those statements, each contributed to the violation of Rule 11.

111 F.R.D. at 651.

The circumstances surrounding the execution of the affidavit in opposition to the summary judgment motion and relative responsibilities of LeFlore and Calloway were considered in the August 1, 1986 opinion and have not been altered by the July 29 hearing. Since Calloway's death has precluded a meaningful development of this record, the conclusions reached there set forth below remain unaltered.

> Calloway stated at trial that the evidence regarding this issue was developed by his attorney and not from his personal knowledge of his signature or his actions and Calloway stated that he was unable to determine for sure whether his signatures were authentic. LeFlore had not consulted any expert at the time of the summary judgment motion, and when an expert was obtained, no material evidence of forgery or facsimile was discovered.

In fact, Calloway's unusual demeanor as a witness at trial suggests that he may have been unaware of the consequences of his statements. On numerous occasions during his trial testimony, Calloway willingly testified in a manner directly contradictory to his prior deposition testimony. When confronted with these inconsistencies, Calloway simply replied that he had no explanation. While one might infer that Calloway's inability to give consistent and forthright testimony resulted from his willingness to follow his attorney's advice rather than his own intent to misrepresent the facts, the evidence to support such an inference is insufficient. In addition, one must give some

consideration to the medical history of Calloway which creates some uncertainty about his capability as a witness. Thus, I conclude that bad faith on the part of Calloway has not been established.

However, I also conclude that the sanctions should be borne jointly and severally by Calloway's estate and his counsel. It is, of course, difficult to allocate responsibility for the frivolous assertions made by Calloway and on his behalf by counsel, especially where the plaintiff has a history of mental illness which may have contributed to his lack of restraint in this action. To the extent that Calloway's acknowledged mental illness is a factor, it militates toward imposing joint liability upon LeFlore who was aware of Calloway's condition by the time of the litigation and certainly should have been aware of it prior to that time. However, Calloway, by his sworn statements, and counsel by his failure to investigate the basis for those statements, each contributed to the violation of Rule 11. Each person failed to uphold his responsibility to set forth accurate facts in opposition to the defendants' motion for summary judgment.

For the sake of completeness, testimony was taken on behalf of LeFlore which quite properly under the terms of the remand set forth could well have been disregarded. Indeed, the conflict between LeFlore and his now deceased client has now been spread even more fulsomely on the record. Even were the testimony to be considered admissible, the mandate notwithstanding, the prior factual

findings were in no way altered by credible evidence. Both LeFlore and Calloway remain responsible for the misstatements.

Under all the circumstances, in spite of LeFlore's obvious self-interest, I decline the opportunity to scrutinize his conduct on the remand further in terms of its propriety under Rule 11. That being so, the amount of the sanctions will remain as determined in August 1986.

Conclusion

For the reasons set forth above upon remand the liability for the $100,000 sanction imposed upon the estate of Calloway will be reinstated. LeFlore will be jointly and severally liable with the estate of Calloway for the amount of $100,000.

Settle judgment on notice.

It is so ordered.

APPENDIX G

Rule 11

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this

rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

APPENDIX H

"Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

"**(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

"**(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

> "(1) it is being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> "(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension,

modification, or reversal of existing law or the establishment of new law;

"(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

"(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

"**(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

"**(1) How Initiated.**

"**(A) By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court

unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

"**(B) On Court's Initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

"**(2) Nature of Sanction; Limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct of comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on

motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

"**(A)** Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

"**(B)** Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

"**(3) Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

APPENDIX 1

"**Rule 16. Pretrial Conferences; Scheduling; Management**

"**(a) Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

"(1) expediting the disposition of the action;

"(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

"(3) discouraging wasteful pretrial activities;

"(4) improving the quality of the trial through more thorough preparation, and;

"(5) facilitating the settlement of the case.

"**(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

"(1) to join other parties and to amend the pleadings;

"(2) to file and hear motions; and

"(3) to complete discovery.

"The scheduling order also may include

"(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

"(5) any other matters appropriate in the circumstances of the case.

"The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

"(c) **Subjects to be Discussed at Pretrial Conferences.** The participants at any conference under this rule may consider and take action with respect to

"(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

"(2) the necessity or desirability of amendments to the pleadings;

"(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

"(4) the avoidance of unnecessary proof and of cumulative evidence;

"(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

"(6) the advisability of referring matters to a magistrate or master;

"(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

"(8) the form and substance of the pretrial order;

"(9) the disposition of pending motions;

"(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

"**(11)** such other matters as may aid in the disposition of the action.

"At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

"**(d) Final Pretrial Conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

"**(e) Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

"**(f) Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or

party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust."

APPENDIX J

"Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

"(a) Judgment as a Matter of Law.

"**(1)** If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

"**(2)** Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

"**(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.** Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after

entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

"**(c) Same: Conditional Rulings on Grant of Motion for Judgment as a Matter of Law.**

"**(1)** If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent

proceedings shall be in accordance with the order of the appellate court.

"(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

"(d) **Same: Denial of Motion for Judgment as a Matter of Law.** If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

APPENDIX K

"**Rule 56. Summary Judgment**

"**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

"**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

"**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

"**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or

as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

"**(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

Supreme Court, U.S.
FILED
MAR 25 1994
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No. 93-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RAY L. LEFLORE, individually and as a partner of PAVELIC & LEFLORE (now dissolved),

Petitioner,

vs.

THE MARVEL ENTERTAINMENT GROUP, a division of CADENCE INDUSTRIES CORPORATION, JAMES GALTON, AL BRODAX, MICHAEL S. KLEIN, THE SHUKAT COMPANY, LTD., SCOTT SHUKAT and PETER S. SHUKAT, ESQ.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petition herein (or at least Questions I and II at p. i of the Petition) is untimely within the meaning of Rule 13.1, as it seeks review of rulings contained in the decision of the Second Circuit Court of Appeals dated August 12, 1988, set forth in Appendix A (1a - 71a).

2. Whether petitioner has waived his opportunity to seek certiorari by not having done so in conjunction with the petition by Pavelic & LeFlore that led to this Court's decision set forth in Appendix D (160a - 170a).

3. Whether the unique facts of this case --in which a plaintiff and his attorney, the petitioner, survived a motion for summary judgment, and thereafter prolonged this litigation for several years, by making false and ungrounded

assertions that the plaintiff's signature on certain agreements had been forged by the defendants, agreements which provided a complete defense to those defendants in this litigation -- provide special and important reasons to warrant review by this Court.

4. Whether the rulings pursuant to Fed.R. Civ.P. 11 in this unique case, which are not in conflict with that Rule, or with any other Federal Rules or decisions, were an abuse of discretion, and otherwise provide special and important reasons for this Court to review them.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES..... iii

JURISDICTION.....1

STATEMENT OF THE CASE.....1

REASONS FOR DENYING THE WRIT.....21

A. Untimeliness and Waiver.. 21

B. The unique facts of this case do not raise any special and important reasons to warrant review by this Court..... 22

C. The rulings below were not an abuse of discretion, and there is no conflict between the Federal Rules or among the Circuits, raised by this case, which needs to be resolved by this Court..... 25

D. The Court of Appeals did not exceed or disregard its mandate here..... 29

CONCLUSION.....35

TABLE OF AUTHORITIES

CASES

Page(s)

Business Guides, Inc. v. Chromatic Communication Enterprises, Inc., 498 U.S. 533, 111 S.Ct. 922 (1991).....30-32

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447 (1990).....29,33

Media Duplication Service v. HDG Software, Inc., 928 F.2d 1228, 1240n (1st Cir. 1991).....28

RULES

FRCP 11.....passim

New York Southern District Civil Rule 3(b) and 3(g) 8-9

Supreme Court Rule 13.1.....1,21

JURISDICTION

Petitioner's jurisdictional statement, on page 1 of the Petition for Writ of Certiorari, fails to mention that the original judgment of the Court of Appeals was entered August 12, 1988 (Appendix A). Petitioner did not seek certiorari with respect to that judgment until now - 6 years later - although petitioner's law firm, Pavelic & LeFlore, sought and was granted certiorari, which led to this court's opinion of December 5, 1989 (Appendix D). Since the instant Petition effectively seeks review of rulings made by the Second Circuit Court of Appeals in its August 12, 1988 opinion, it is untimely under Rule 13.1.

STATEMENT OF THE CASE

The undersigned, admitted to

practice before this Court, has been involved in this case for 12 years, as has petitioner. In his Petition, Mr. LeFlore continues his 12 year pattern of behavior by omitting material facts and misstating the facts and the law applicable to this case. This brief does not purport to take issue with every incorrect statement in Mr. LeFlore's Petition. To do so would exceed this Court's page limitations. Only the most significant ones are dealt with.

The original complaint in this action sought $11 million in compensatory damages and $33 million in punitive damages, on behalf of plaintiff Calloway, against The Marvel Entertainment Group,[1]

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[1]Pursuant to Rule 29.1, The Marvel Entertainment Group is a subsidiary of MacAndrews & Forbes Holdings, Inc.

James Galton, Al Brodax (the "Marvel defendants") and other defendants, including Michael Klein and Peter Shukat, Esq., who had been Mr. Calloway's lawyer for more than 10 years prior to the commencement of this action in 1982. The central claim in the original complaint was that the defendants had infringed Calloway's copyright in The Skyrider (a draft motion picture screenplay) by making unauthorized changes in it and distributing it to certain third parties without proper authorization.

Annexed as exhibits to the original complaint, which was signed by petitioner, were certain written agreements dated June 8, 1981 which were signed by Calloway, the plaintiff (the "June 8, 1981 agreements"). The complaint alleged that:

> "...plaintiff [Calloway] and Klein and Quiros...entered into a series of agreements, memorializing their respective rights and obligations ...Copies of the foregoing agreements are attached as exhibit C [the June 8, 1981 agreements]."

What petitioner apparently failed to recognize at the time was that these very agreements provided a complete defense to Calloway's claims, since they contained a provision embodying Calloway's authorization to permit defendants to make changes in The Skyrider and to distribute it to third parties, thus negating the claim of copyright infringement and unauthorized use.

After this defense was brought to Mr. LeFlore's attention during the course of a motion for dismissal on that ground in early 1983, Mr. LeFlore did something that triggered the chain of

events that led to the Rule 11 award herein. He prepared and served an amended complaint, once again signed by him, seeking the same monetary damages and making the same central claim of copyright infringement. The amended complaint, however, no longer annexed the June 8, 1981 agreements as exhibits. Instead, a new series of allegations was made in the amended complaint, namely, that Calloway's signature on the June 8, 1981 agreements had been forged by Peter Shukat, his attorney for more than 10 years.[2] The complaint further alleged that Peter Shukat had been "solicited" to do this "at Marvel's behest" and accused all of the defendants of conspiring to

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[2]The word "forgery" is carefully omitted from the Petition, except for one backhanded reference on p. 27.

create "a series of false and deceptive agreements." This amended complaint was the first of no less than 7 papers signed by Mr. LeFlore and submitted to the District Court over a span of 3 years (1983-1986) in violation of Rule 11 in this litigation.

Later in 1983 another motion to dismiss was made by various defendants, and was granted by Judge Sweet with respect to certain defendants (the Shukat defendants and Dumler & Giroux) because of the absence of a sufficiently pleaded federal jurisdictional basis as to those defendants. In connection with this motion, Mr. LeFlore submitted a Memorandum of Law dated October 19, 1983 which was signed by him and in which he reiterated the allegations of forgery of Calloway's signature on the June 8, 1981

agreements. Judge Sweet denied the motion to dismiss as to the Marvel defendants.

The dismissed defendants (the Shukat defendants and Dumler & Giroux) were impleaded back into the action as third party defendants by the Marvel defendants in early 1984 (not on the eve of trial, as suggested by petitioner). This was done for one reason only: if the allegations in the amended complaint were true, and if the June 8, 1981 agreements were unavailing because of the forgery of Calloway's signature, the Marvel defendants might well have a proper claim over against the third party defendants. Mr. LeFlore himself later conceded this in a reply memorandum of law signed by him, dated May 3, 1984, in which he said:

> "Once it is shown, as it already has been, that plaintiff did not sign or approve any such documents [the June 8, 1981 agreements], defendants' only recourse is to claim over against those individuals who either forged plaintiff's signature or represented they were authorized to sign for him. Defendants' third party complaints against Scott Shukat, Peter Shukat and Dumler & Giroux...perfectly mirror plaintiff's claims..."

The Certiorari Petition, at pages 25-26, misstates the foregoing series of events.

In the spring of 1984, the Marvel defendants moved for summary judgment on the basis of the June 8, 1981 agreements. Four papers were submitted by Mr. LeFlore in opposition to this motion:

> 1) a memorandum of law dated April 2, signed by LeFlore,
> 2) a Rule 3(g) statement dated April 3, 1984 signed by LeFlore[3],

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[3]In the Southern District of New York, local Civil Rule 3(g) requires the submission by counsel, on a motion for summary judgment, of a statement setting

3) a reply memorandum of law dated May 3, 1984 signed by LeFlore,
4) an affidavit dated April 2, 1984 signed by Calloway.

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forth those material facts as to which it is contended that there is no genuine issue to be tried. Mr. LeFlore's 3(g) statement contended that the issue of forgery was such an issue. Local Civil Rule 3(b) requires the submission of a memorandum of law in connection with any motion. Failure to comply with either Rule 3(b) or 3(g) is a basis for denial of the motion, in the case of a movant, or the granting of the motion, in the case of the party in opposition. Rule 3(b) provides in pertinent part:

> "Upon any motion the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion...Failure to comply may be deemed sufficient cause for the denial of the motion..."

Rule 3(g) provides in pertinent part:

> "Upon any motion for summary judgment..., there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement constitutes grounds for denial of the motion..."

Each of these papers advanced the baseless contention that Calloway's signature on the June 8, 1981 agreements had been forged.

Mr. Calloway's April 2, 1984 affidavit, undoubtedly prepared by Mr. LeFlore (37a), who was then a single practitioner, stated in paragraph 7 that he had "neither signed nor approved" the June 8, 1981 agreements, which "were forged and contrived to deceive."

LeFlore's April 2, 1984 memorandum of law (the same date as Calloway's affidavit) stated on page 6:

> "The only basis on which defendants could hope to obtain summary judgment in their favor is their claim that plaintiff signed or approved the agreements on which they purport to rely.
>
> Plaintiff's affidavit, sworn to April 2, 1984, unequivocally attests that he neither signed nor approved the

agreements upon which defendants purport to rely.

* * *

There could be no clearer statement that defendants have nothing authentic on which to rely."

Because an "issue of fact" was thus raised, the District Court (Judge Robert W. Sweet) denied the motion for summary judgment, but specifically warned Calloway and LeFlore about sanctions under Rule 11:

"Calloway does not dispute defendants' contentions that the terms of the [June 8, 1981 agreements] would authorize defendants' acts, but states by affidavit that he never signed or approved the Option Agreement and that Peter Shukat, without Calloway's knowledge, affixed a facsimile of Calloway's signature to the agreement.

* * *

Calloway has by a narrow margin put sufficient facts in contention to withstand defendants' summary judgment motion. However, Calloway should be aware that this Court has awarded attorney's fees against the plaintiff who was found after trial

> to have pursued a claim in bad faith and without factual support...The Court will not hesitate to award such costs if the facts are found after trial to warrant such an award".

The District Court's warning went unheeded, as Calloway and LeFlore pursued their baseless contention for yet another two years.

Although the accusation of forgery was first made in Mr. LeFlore's amended complaint in mid-1983, he did not see fit to consult a handwriting expert - Pearl Tytell - until November 1984. Ms. Tytell provided no support for the claim of forgery (25a). Nevertheless, at a transcribed conference before the District Court on December 5, 1984, the following colloquy took place between District Judge Robert Sweet and Mr. LeFlore:

"The Court: So your position is that the signature on the document is a fake?

Mr. LeFlore: Yes.

The Court: And it was put on by somebody else in some device, as, obviously, in your view, by definition, unknown. He can say, 'yes, this appears to be my signature, but I didn't sign that document, somebody must have jimmied the document.'

Mr. LeFlore: Yes.

As indicated above, the forgery claim was variously referred to as the "facsimile" claim as well. In interrogatory responses dated June 3, 1985, signed by both Mr. LeFlore and Mr. Calloway, they asserted that the June 8, 1981 agreements

> "...evidence the affixation of a facsimile of plaintiff's signature thereto and evidence defendants' fraudulent intent in respect thereto...Plaintiff did not sign such

documents."[4]
Then, in March 1986, in a proposed pre-trial order, signed by Mr. LeFlore, he once again reiterated the allegations of forgery set forth in the amended complaint.

Shortly thereafter, literally on the eve of trial which began in early April 1986, Mr. LeFlore purportedly abandoned the forgery or facsimile claim by making no reference to it in a letter amending his pre-trial order, and instead relying upon a "white-out claim", which turned out to be complete nonsense (see 112a-113a, 28a and 36a).

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[4]Illustrative of Petitioner's seeming inability to cope with the truth, six weeks earlier he had signed interrogatory responses dated April 22, 1985 in which he stated:
"Plaintiff has never alleged any forgery of plaintiff's signature".
The Court of Appeals observed in its 1988 decision that "...LeFlore takes the astonishing position that he never advanced the facsimile [forgery] claim..." 854 F.2d at 1456.

Although the jury trial in this case took six weeks and spanned several thousand pages of testimony and several hundred exhibits, the jury returned a verdict in favor of defendants in the remarkably short time of 6 hours.

Not only had the District Court warned Calloway and LeFlore about the imposition of sanctions under Rule 11 in its July 3, 1984 decision denying summary judgment, but numerous warnings were given to Mr. LeFlore by the undersigned and by other defendants' counsel in 1984, 1985 and through the trial of this case in 1986. These warnings were ignored as he pursued his baseless claims.

Following the trial, all defendants moved for Rule 11 sanctions, submitting extensive supporting affidavits and exhibits, including their invoices for legal fees aggregating nearly $1 million (56a, 130a). Despite

an obvious conflict, Mr. LeFlore continued to represent Mr. Calloway in the course of the Rule 11 proceeding (53a). Neither Mr. LeFlore nor Mr. Calloway submitted an affidavit disputing the facts or contentions of the defendants' motion papers. Nor did they contest or dispute the amount of the defendants' legal fees, or submit any evidence concerning their financial well-being. Judge Sweet held a hearing on the Rule 11 motions and no testimony was proffered by either Mr. LeFlore or Mr. Calloway.

Following the hearing, Judge Sweet issued a lengthy opinion (appendix B) in which he imposed sanctions of $100,000 against Calloway and $100,000 against LeFlore, of which $50,000 was to be joint and several against Mr. LeFlore's then law firm, Pavelic &

LeFlore.[5] This award represented approximately 20% of the defendants' aggregate defense costs and was to be shared by them pro rata according to the amount each expended in defense costs. A judgment reflecting this award was signed by the District Court on January 30, 1987 and filed February 2, 1987.

Both LeFlore and Pavelic & LeFlore appealed to the Second Circuit from the imposition of sanctions. Calloway took a pro se appeal, which was dismissed for his failure to prosecute it, but was sua sponte reinstated by the Court of Appeals in the course of its decision dated August 12, 1988 (49a - 55a). The Marvel defendants also took a cross appeal, seeking, inter alia, an increase in the amount of sanctions that had been imposed against LeFlore, Pavelic

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[5]Following this award, LeFlore ceased representing Calloway.

& LeFlore and Calloway.

The Second Circuit affirmed the result reached by Judge Sweet, but found that there had been a clear conflict of interest in LeFlore's having represented Calloway in the Rule 11 proceeding and, for this reason, vacated the $100,000 sanctions award against Calloway, and remanded the matter to the District Court to determine whether to reimpose some or all of the $100,000 sanctions against Calloway, and whether to make Mr. LeFlore and Pavelic & LeFlore jointly and severally liable for some or all of those sanctions (49a - 59a).

Pavelic & LeFlore subsequently sought and was granted certiorari by this Court. Mr. LeFlore did not then seek certiorari with respect to the Second Circuit's decision of August 12, 1988, although he purports to do so now. In its December 5, 1989 opinion, this Court

determined that Rule 11, as it was then constituted (appendix G), did not permit the award of sanctions against a law firm, but only against an individual attorney who was a signatory of the offending papers (appendix D).[6]

Thereafter, a remand hearing was held before Judge Sweet on July 29, 1991, as directed by the Second Circuit's decision of August 12, 1988 (Appendix A), as modified by this Court's opinion (Appendix G). Despite an invitation to do so by Judge Sweet, LeFlore offered no current evidence with respect to his financial condition (179a, 191a).[7] In

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[6]Rule 11 has since been amended (Appendix H). Among the amendments is the power to impose sanctions against the law firm.

[7]"THE COURT: Do you make any representation as to your assets now?"
MR. LEFLORE: As of today?
THE COURT: As of now.
MR. LEFLORE: No, your Honor."

addition, contrary to petitioner's assertion, Dr. Butz, who was questioned by Mr. LeFlore at the remand hearing, was never asked and never testified about Calloway's mental condition in 1983, 1984 and 1985, the crucial pre-trial period of this lawsuit (178a - 179a, 191a).

Following that hearing, Judge Sweet rendered a decision (appendix F) in which he reinstated the $100,000 in sanctions as against Calloway (now the estate of Calloway) and imposed them jointly and severally as against LeFlore. LeFlore thereafter took an appeal to the Second Circuit, which rendered a decision (appendix E) affirming the District Court, except, in part, with respect to the award of interest. The issue of interest has not been raised by petitioner in his Petition for Certiorari.

REASONS FOR DENYING THE WRIT

For the reasons hereinafter stated, it is respectfully submitted that this Court should not grant the Writ of Certiorari sought in this case.

A. Untimeliness and Waiver

In order to obtain review of a judgment, a Petition for a Writ of Certiorari must be filed within 90 days after the entry of judgment, pursuant to Rule 13.1 of this Court's Rules. The Petition herein repeatedly challenges and seeks review of rulings contained in the Second Circuit's decision of August 12, 1988, which is prominently included as Appendix A. Questions I and II on p. i of the Petition clearly relate only to the Second Circuit's decision of August 12, 1988. Petitioner had the opportunity to seek certiorari with respect to these rulings when his law firm sought review

of them, leading to this Court's decision of December 5, 1989, included as Appendix D. Not having done so in 1988, Petitioner has waived the right, and his attempt to do so at this juncture is untimely. Accordingly, the Petition for Certiorari should be dismissed on that basis.

B. The unique facts of this case do not raise any special and important reasons to warrant review by this Court.

It is difficult to imagine a more egregious violation of Rule 11 than that engaged in by petitioner. Without any reasonable inquiry as to whether the claim of forgery was well grounded in fact, petitioner made and repeated that serious assertion in a series of papers all signed by him and filed with the District Court: the amended complaint in mid-1983, a memorandum of law in October 1983, summary judgment papers in

April 1984, interrogatory answers in 1985 (after having been told by the handwriting expert, belatedly hired by him, that there was no basis for the claim of forgery), and a pre-trial order on the eve of trial in 1986.

The gravity of petitioner's conduct, which clearly caused unnecessary delay and a needless and substantial increase in the cost of the litigation, was compounded by the fact that the very documents, which he repeatedly asserted contained the forged signature of his client, had been annexed by petitioner to the original complaint (signed by petitioner), and were alleged then to be the bona fide agreements between his client and the defendants. Seven months later, these very same agreements were suddenly unreliable because Calloway's signature on them had been "forged". Without any basis whatsoever and without

any pre-litigation inquiry, petitioner facilely accused his client's prior lawyer of 10 years (Peter Shukat) of having committed the forgery, in conspiracy with and at the urging of the other defendants.

Petitioner's brazen and false assertions continued over a period of 3 years, despite repeated warnings from both defendants' counsel and the District Court about the imposition of sanctions pursuant to Rule 11.

Petitioner's conduct has now been the subject of scrutiny in two District Court decisions and two Court of Appeals decisions. All four decisions have resoundingly concluded that petitioner's conduct was in violation of Rule 11 and that the sanction imposed was appropriate and consistent with the purposes of Rule 11. There are simply no special or important reasons for this

Court to review petitioner's conduct as well.

C. The rulings below were not an abuse of discretion, and there is no conflict between the Federal Rules or among the Circuits, raised by this case, which needs to be resolved by this Court.

Aware of the most common basis for the granting of certiorari by this Court, petitioner attempts to fashion a conflict between the Federal Rules and/or among the Circuits. Petitioner's assertions of conflict are as baseless as were his assertions of forgery.

The essence of petitioner's argument is that -- because his false assertions of forgery created "an issue of fact", which enabled him and his client to survive a motion for summary judgment and thereafter to prolong this litigation for several more years on the strength of repeated assertions of forgery -- that should somehow immunize

him from Rule 11 sanctions. The bottom line of petitioner's argument is that rogues should be rewarded for their duplicity and dishonesty. To put it another way, as long as a lawyer and his client are willing to prostitute themselves by false assertions in summary judgment and other papers, allowing their case to continue rather than be dismissed, that should somehow immunize them from Rule 11 sanctions. For that to be the guiding principle underlying Rule 11 would truly be astounding.

In making this specious argument, petitioner also contends that because the District Court did not impose sanctions upon him at the time of the motion for summary judgment, sanctions thereafter were not warranted. This is absolute nonsense. The District Court, in denying summary judgment, found that the papers submitted by petitioner and

his client raised "an issue of fact" that required the denial of summary judgment, but nevertheless warned petitioner and his client about the imposition of sanctions under Rule 11. Secondly, defendants did not make a motion at that time for the imposition of sanctions. Such a motion was made only after the conclusion of the case in 1986.

To the extent that petitioner relies upon cases which suggest that sanctions should not be imposed after trial when a party has previously survived a summary judgment motion, those cases are not in any way supportive of petitioner's position here. None of the cited cases involved blatantly false misrepresentations to the Court on the summary judgment motion, without which the motion would have been granted, which is precisely the case here. Indeed, one of the very cases cited and relied upon

by petitioner made a point in its decision of distinguishing the instant case. In Media Duplication Service v. HDG Software, Inc., 928 F.2d 1228, 1240n (1st Cir. 1991), the First Circuit stated:

> "Significantly, ... in Calloway, it was eventually revealed that the central basis for opposing summary judgment - an affidavit prepared for a party by its attorney - stated a material fact for which there had never been any basis."

If there are cases that hold that Rule 11 sanctions are not warranted when an attorney and his client have been clever and dishonest enough to survive a summary judgment by submitting papers with false statements in them (and we are aware of none), then we would welcome this Court's intervention and the granting of certiorari so that the proper rule of law could be pronounced. We do not believe, however, that the Federal Judiciary or the Federal Bar needs such a

pronouncement, since the rule of law is so obvious.[8]

D. The Court of Appeals did not exceed or disregard its mandate here.

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[8]Leflore also contends that the amount of the sanctions, representing about 20% of the defendants' attorneys fees, was unjustified because it failed to take into account various discovery motions that were made during the course of the litigation. What he fails to reveal is that the principal focus of the discovery motions was an effort by the defendants to get to the bottom of the claim of forgery and to determine whether there was any expert testimony to support it. Discovery motions were necessary only because of Mr. LeFlore's obfuscation and deceit in failing to provide this information pursuant to discovery demands. The District Court, which had to deal with these matters on an ongoing basis during this litigation, observed in its August 1, 1986 opinion:

"During discovery, the defendants sought to obtain this evaluation by Calloway's document examiner, yet none of the relevant interrogatories were meaningfully answered by the plaintiff."

The Court of Appeals determined that the District Court's award was not excessive and was not an abuse of discretion (56a). See, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447 (1990).

When the motion for sanctions was made in the District Court in 1986, petitioner represented himself and his client in connection with the motion. Neither petitioner nor his client submitted an affidavit in opposition to the motion for sanctions, nor did they testify at the hearing that was held.

Petitioner's client has since died. Petitioner now seeks to place the blame solely upon his client for the violation of Rule 11, and argues that the Court of Appeals and the District Court violated this Court's holding in Business Guides, Inc. v. Chromatic Communication Enterprises, Inc., 498 U.S. 533, 111 S.Ct. 922 (1991), by making petitioner jointly and severally liable for the sanctions that were imposed upon his client.

Petitioner made the identical argument to the Court of Appeals in

connection with its decision dated November 9, 1993 (Appendix E). The Court of Appeals properly distinguished the Business Guides case and found that its holding was not pertinent to the instant case, for the reasons expressed at 175a - 180a. While this Court in Business Guides held "that a represented party who signs his or her name bears a personal non-delegable responsibility to certify the truth and reasonableness of the document" (498 U.S. at 547), neither this ruling nor the plain language of Rule 11 ("...or both...") precludes the imposition of joint and several liability upon both the party and his attorney for violation of Rule 11. Indeed, while petitioner relies upon and quotes from this Court's decision in the Business Guides case, he fails to include the following quotation which supports the result reached below:

> "Where a represented party appends its signature to a document that a reasonable inquiry into the facts would have revealed to be without merit, we see no reason why a District Court should be powerless to sanction the party in addition to, or instead of, the attorney." (emphasis added).

111 S.Ct. at 932.

Petitioner's emphasis, after his client's death, upon the fact that his client signed an affidavit in opposition to the summary judgment motion (which petitioner himself prepared - 20a), ignores the fact that it was petitioner who signed the amended complaint in mid-1983, which first made the accusations of forgery. It also ignores the fact that it was petitioner as well who signed:

- A memorandum of law in opposition to defendants' motion to dismiss filed October 19, 1983, which reiterated the accusations of forgery

- A memorandum of law dated April 2, 1984 in opposition to defendants' motion for summary judgment

- A Rule 3(g) statement filed by

petitioner in April 1984 in connection with the summary judgment motion

. A reply memorandum of law dated May 3, 1984

. Responses to interrogatories dated June 3, 1985

. An undated pre-trial order served on March 25, 1986

Each of the foregoing papers was signed by petitioner, and each reiterated the baseless claim of forgery of the June 8, 1981 agreements, unnecessarily prolonging this litigation.[9]

Finally, there is no merit to petitioner's argument that the Court of Appeals "disregarded this Court's other controlling decisions" in permitting

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[9]Although the rulings of the District Court and the Court of Appeals in this case were consistent with this Court's determination that "any interpretation [of Rule 11] must give effect to the Rule's central goal of deterrence" (Cooter & Gell, 110 S.Ct. at 2454), Mr. Leflore's total lack of remorse or regret obviously continues to this day.

joint and several liability to be imposed by the District Court against petitioner on behalf of all defendants. While this ruling did not in any way violate this Court's instructions or other controlling decisions, even if petitioner were correct, it would simply mean that the Marvel defendants would have a greater share of the award, and would have no practical effect upon petitioner himself. Such an issue hardly merits the attention of this Court.

Yet in advancing this argument, Mr. Leflore once again misstates the record. In its August 12, 1988 opinion, the Second Circuit sua sponte reinstated Calloway's appeal and stated:

> "Whether LeFlore and the firm should be jointly and severally liable for sanctions imposed on Calloway, in addition to the separate judgment against them, however, does fairly arise from Calloway's appeal." (emphasis added)(58a).

Thus, whether Peter Shukat or Michael

Klein took a separate cross-appeal is immaterial, since the issue was raised by Calloway's reinstated appeal.

CONCLUSION

It is respectfully submitted that the Writ of Certiorari sought herein should be denied, with costs and disbursements to the undersigned defendants, and such other relief as is just and proper.

Dated: April 20, 1994

Respectfully submitted,

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